

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 382

FRANK J. PATE, WARDEN, PETITIONER,

vs.

THEODORE ROBINSON.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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[fol. 2]

No.

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS**

PEOPLE OF THE UNITED STATES, ex rel.:
THEODORE ROBINSON, Petitioner,

—vs.—

FRANK J. PATE, Warden, Illinois State Penetentiary,
P. O. Box 1112, Joliet, Illinois, Respondent.

MOTION AND PETITION FOR WRIT OF HABEAS CORPUS IN *Forma
Pauperis* BY THE FEDERAL HABEAS CORPUS ACT—Filed
April 13, 1962

To:

Hon. Roy H. Johnson, Clerk, United States Court House,
R. 601, 225 South Clark Street, Chicago (4), Illinois.

From:

Theodore Robinson, Petitioner and Attorney Pro se,
Reg. No. 44882—Box 1112, Joliet, Illinois.

[File endorsement omitted]

[fol. 3]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

[Title omitted]

PROOF OF SERVICE

Theodore Robinson, after being duly sworn on his oath,
deposes and says, that he placed in the hands of Prison

Officials on the day of October, A.D., 1961, a carbon MOTION AND PETITION FOR WRIT OF HABEAS CORPUS *in Forma* copy of his petition for writ of habeas corpus attached hereto; and that he instructed them to mail said copy, without delay, to the Honorable William G. Clark, Attorney General for the State of Illinois at his Office in Springfield, Illinois, in order that he may file his appearance for the Respondent in the above-captioned cause.

Theodore Robinson, Pro se.

Subscribed and sworn to before me on this 3 day of November, A.D., 1961.

Edwin J. Meyer, Notary Public.

[fol. 4]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
Habeas Corpus No.

PEOPLE OF THE UNITED STATES, ex rel.:
THEODORE ROBINSON, Petitioner,

—vs.—

FRANK J. PATE, Warden, Respondent.

MOTION FOR WRIT OF HABEAS CORPUS—Filed April 13, 1962

Comes Now the Petitioner Herein, Theodore Robinson, and respectfully moves this Honorable Court to issue a writ of habeas corpus in the above-entitled cause and that the Court appoint Counsel to represent him in these proceedings.

In support of said motion the petitioner submits the following facts and representations, to wit:

1st. That he is a citizen of the United States of America; that he is imprisoned within the jurisdiction of this Honorable Court, in the State of Illinois, by the respondent aforesaid, and by a process that he verily believes to be *Null* and *Void*, and lawfully legal as for naught.

2nd. That he is informed and verily believes that he has a meritorious cause for action towards the protection and safeguarding of his legal and constitutional rights; that therefore petitioner earnestly prays that this Honorable Court will receive, file and docket, and assign for hearing and disposition his Motion and Petition for a writ of habeas corpus.

3rd. That due to his indigence, petitioner is unable to retain competent counsel to represent him during the course of these proceedings, and that he fears that he will be unable to properly protect himself in this cause of action without the aid of competent counsel.

4th. That he is unable to pay the casts of these proceedings or give surety for the same, wherefore he again prays the Court will permit him to proceed as a poor person, without payment of costs, pursuant to an act made and provided for such cases, to wit: 28 U.S.C.A. 1915.

5th. That petitioner further shows and represents to this Honorable Court that he is not committed or detained by the virtue of any other process, judgment or execution issued by any other court or judge of the United States, in which such court or judge has exclusive jurisdiction, nor by virtue of a final judgment for any treason, felony or any other crime committed in other state or territory.

[fol. 5] Petitioner brings this action in accordance with the provisions of the Habeas Corpus Act that provides that a person may be discharged on Habeas Corpus for the viola-

tion of constitutional rights guaranteed by the United States Constitution, and he hereby invokes the provisions in the new Federal Judicial Code, Title 28 U.S.C.A. under Chapter 153, titled Habeas Corpus and the pertinent sections thereunder, viz., Sections 2241, 2242, 2243, 2246, 2247, 2248, 2249 and particularly 2254, which states, to wit:

State Custody: Remedies in State Courts.—“An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process *or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.* (Emphasis supplied.)

Wherefore, it is respectfully prayed that the Court accept this cause of action; that the above motion be granted, and that the petitioner be brought in person into the United States District Court at Chicago, Illinois, for a hearing on his motion and on the Petition attached.

Respectfully submitted,

Theodore Robinson, Pro se.

[fol. 6]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

[Title omitted]

PAUPER'S OATH

Now comes Theodore Robinson, and after first being duly sworn upon his oath, deposes and says, that he owns no real or personal property and has no money or income from

any source whatsoever with which to pay the costs of these proceedings; that he is a citizen of the United States of America and verily believes that he has a meritorious cause of action; that he fully qualifies as a poor person within the meaning of the statute 28 U.S.C.A. 1915 made and provided.

Further Affiant Sayeth Not.

Theodore Robinson, Affiant.

State of Illinois)
County of Will) ss.

Subscribed and sworn to before me on this 3 day of November, A.D., 1961.

Edwin J. Meyer, Notary Public.

[fol. 12]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
Habeas Corpus No.

PEOPLE OF THE UNITED STATES, ex rel.:
THEODORE ROBINSON, Petitioner,

—vs.—

FRANK J. PATE, Warden, Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

May It Please the Court:

Comes now the petitioner, Theodore Robinson, and respectfully represents unto this Honorable Court that he is being illegally and unlawfully detained, restrained, and otherwise deprived of his liberty and freedom, by the aforesaid respondent, in the Illinois State Penitentiary, (State-

ville-Branch); and that the aforesaid respondent purports to hold, detain, and restrain petitioner under and by a certain judgment, sentence, and mittimus, contrary to the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution; that said mittimus resulted from a proceeding held in the State of Illinois in the Criminal Court of Cook County following the entry of final judgment on the sixteenth day of September, A.D., 1959, in Cause Gen. No. 59-793, entitled People of the State of Illinois, Plaintiff —vs.— Theodore Robinson, Defendant.

And your petitioner complaining further shows and respectfully raises the following points in support of his contention that he is being illegally detained and deprived of his liberty contrary to the Due Process and the Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution and therefore entitled to his lawful discharge by the Federal Habeas Corpus Act:

[fol. 13]

Statement on Exhaustion of State Remedies

The Illinois Supreme Court entered judgment in cause Docket Number 35763 (*People State of Illinois, defendant in error, vs. Theodore Robinson, plaintiff in error*). The court below's Opinion has been officially recorded under vol. no. 22 Ill. 2d 150. However, a printed copy of said Opinion rendered in the aforesaid cause is attached and marked APPENDIX "A".

Application for writ of certiorari—Robinson v. Illinois,—docketed June 26th, as No. 251 Miscellaneous, was denied in the October Term, 1961.

Jurisdictional Statement

The jurisdiction of this Honorable Court is invoked under *Part V, Rule 19 (a)* "... Where a state court has decided a federal question of substance ... in a way probably not in accord with applicable decisions of this Court."

The judgment sought to be reviewed was entered on May 19, 1961, in proceedings under Illinois Supreme Court Rule 65-1, pertaining to appeals on writ of error for indigent defendants.

Statutory Provision on This Court's Jurisdiction: The jurisdiction of this Court is further invoked under 28 U.S.C.A. Section 1257 (3).

Questions Presented for Review

1) Whether trial court's failure to summon jury to determine the issue of defendant's sanity—when the prosecuting attorney himself evidenced doubt of defendant's sanity and suggested that a psychiatrist be called to testify concerning his sanity—was a denial of adequate opportunity to the indigent defendant to sustain his defense of *not guilty of murder by reason of* [fol. 14] *insanity* at the time of the commission of the crime?

2) Whether refusal of the trial court to permit defendant to subpoena witnesses was a denial of due process of law?

Constitutional Provision Involved

Section 1 of the Fourteenth Amendment of the United States Constitution. "... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

State Statutory Provisions Involved

Chapter 38, Section 592, Illinois Revised Statutes (1959).

"A lunatic or insane person, without lucid intervals shall not be found guilty of any crime or misdemeanor with which he may be charged: Provided, the act so charged shall have been committed in the condition of

insanity. If upon the trial it shall appear from the evidence that the act was committed as charged, but at the time of committing the same, the person so charged was lunatic or insane, the JURY SHALL so find by their verdict . . . ”

Chapter 38, Section 593, Illinois Revised Statutes (1959).

“ . . . In all of these cases, it shall be the DUTY OF THE COURT TO IMPANEL A JURY TO TRY THE QUESTION WHETHER THE ACCUSED BE, AT THE TIME OF IMPANELING, INSANE OR LUNATIC.”

Chapter 38, Section 735, Illinois Revised Statutes (1959).

“It shall be the duty of the clerk of the court to issue subpoenas, either on the part of the people or of the accused . . . ”

[fol. 15] Statement of the Case

The petitioner Theodore Robinson, 31 years of age, was indicted by a Cook County Grand Jury in Illinois. The indictment contained two counts. Count 1 of the indictment charged that Theodore Robinson late of Cook County on the 28th day of February, 1959, in the said County of Cook shot and killed one Flossie May Ward. (Tr. No. 59-793, p. 4)

The petitioner pleaded not guilty to the indictment by reason of insanity after court-appointed counsel was selected to represent him. (Tr. pp. 7-8)

On September 15, 1959, the petitioner waived trial by jury, submitted the cause to the court for trial and was tried and found guilty of the crime of murder in manner and form as charged in the indictment and sentenced to a term of his natural life in the Illinois State Penitentiary. (Tr. pp. 21-22)

At the Trial

Testimony on behalf of the State revealed that the petitioner, Theodore Robinson, had been Flossie Mae Ward's boy friend for about four years and that recently he and Flossie had started living together as husband and wife. (Tr. p. 58)

For four months, Flossie had been employed at a barbecue house located at 1035 E. 63rd Street, Chicago. She and two other persons—Jim Hackman and Neddie Batts worked the second shift (8:00 P.M. to about 4:00 A.M.); the first two hours of each evening being spent in back room preparation of foods they were to serve. (Tr. pp. 81-82) The restaurant was a rather small one, about 25 x 25 having somewhat of a semi-circular counter (or L shaped counter) with stools along the counter at the side, and at the back of the counter there was a gate. Behind the counter, near the front, there was a deep fry and along [fol. 16] the wall there was an ice box, all leaving a three foot passageway. (Tr. p. 67)

Neddie Batts had been working there about one month as a waitress and Jim Hackman had been working there for four years. (Tr. pp. 73, 102) The petitioner usually went into the restaurant about 1:00 P.M. to have his dinner about three or four times a week and would return around 4:00 A.M. or 5:00 A.M. to take Flossie home, and he was known to both Neddie and Hackman. (Tr. p. 73)

According to Neddie, about 4:00 A.M. one week before the shooting, the petitioner had called for Flossie and was to take her and Neddie home. A man (later identified as Flossie's legal husband) had unexpectedly appeared on the scene demanding that Flossie accompany him home. There was an argument between them and the petitioner had asked Neddie to *call the police*. (Tr. pp. 97, 98)

On the 28th day of February, 1959 at about 10:30 P.M. according to this witness, the petitioner rushed in the restaurant, wearing a dark top coat and a brown hat, jumped over the counter and Flossie said "Don't start nothing to-

night," and the petitioner said nothing. Then Neddie testified that she heard shots. Flossie jumped over the counter and the petitioner again jumped over the counter. The witness Neddie saw nothing further because she ran to the basement. (Tr. pp. 91-94)

Jim Paul Hackman testified that on the night in question, the petitioner came into the restaurant about 10:30 and stopped at the front of the counter where Hackman and Flossie were standing side by side, at which time Hackman saw a gun in the petitioner's hand. (Tr. pp. 107-108)

According to Hackman when the petitioner entered the restaurant with the gun in his hand, Flossie who was closest to him, look up and said "Don't start anything tonight, Ted," and went back to what she was doing (fixing orders). The petitioner went to the back of the counter (away from Flossie), jumped over the counter, rushed up toward [fol. 17] Flossie and began to shoot (Tr. pp. 107-108). Hackman admitted on cross examination that he did not watch the petitioner all the time (Tr. p. 121). On redirect examination, Hackman testified that the petitioner appeared sober.

Clarence Starr, a witness called on behalf of the People testified that one Robert Moore who lives in the same apartment building where Starr lives at 1409 North Wolcott, came to his apartment and told him that there was the petitioner there who was suspected of murder. Starr then called for help and one officer Kerfman and another officer answered the call; that Starr met the officers on the first floor of the building and then proceeded to the 13th floor, approached apartment 1307 where the Moores lived and ascertained that the petitioner had left. They arrested a man who was in the hall just about 20 feet away from the Moore's apartment who answered the description of Theodore Robinson (the petitioner). (Tr. pp. 135-136) As the officers approached the petitioner he turned around and looked at them, making no attempt to flee.

Starr further testified that he, Officer Creed and Officer Williams, about an hour and a half later returned to the Moore's apartment and obtained a navy blue regular length overcoat having a gun wrapped in a handkerchief in the inside pocket, and also a hat. He testified that the petitioner admitted that the clothes were his while he was in the car outside the apartment building. (Tr. p. 140)

Officer Kerfman who testified on behalf of the People stated that he assisted in the arrest, but never heard any conversation concerning the coat and the hat and the gun. He stated that, "We arrested the defendant, took him to 27th District Station" and that when the overcoat was procured and in his words "We placed him under arrest and took him to the 27th District Station." (Tr. p. 144)

Officer Robert Breckenridge, a witness called on behalf of the People testified that he and another officer from the 7th District had occasion to investigate the crime and that [fol. 18] when he arrived at 1035 E. 63rd Street he observed two persons lying on the sidewalk, one male and one female. The female was later identified as Flossie Mae Ward, that the two persons were taken to Woodlawn Hospital. (Tr. p. 154)

After the State rested its case, the defense called Willie Ceola Peterson, the petitioner's mother, (Tr. p. 215), Helen Calhoun, the petitioner's aunt (Tr. p. 246), William Henry Langham, the petitioner's grandfather (Tr. p. 237) and Alice Moore (Tr. p. 231). They all testified that based on their observation of the defendant "he is insane" and doesn't know the difference between right and wrong.

The mother of the petitioner once in 1958 and again in 1959 (just prior to the death of Flossie Ward) had warrants issued for the petitioner in an attempt to have him returned to a mental hospital, but the warrants were never served. The petitioner had upon one occasion beat up her brother-in-law and was generally fighting in the streets and people were beating him up. (Tr. pp. 226-227)

The petitioner's grandfather, Lingham, had seen the petitioner a few days prior to the death of Flossie and he

testified that the petitioner was "giddy", laughed too much, and that he believes him to be partially insane at all times. (Tr. pp. 240-241)

On behalf of the petitioner it was brought out at the trial that as a child he was a kind and affectionate child, but at the age of seven a girl dropped a brick on his head from the third floor causing the petitioner to become cross eyed, and since that time his behavior had been unusual. (Tr. p. 216) However, the petitioner went to the army and in 1945, upon one occasion when home on furlough, for no reason he kicked a hole in a small bar which his mother had in the house. (Tr. p. 218). There was no liquor on the bar. Since he has returned from the service he keeps a glare in his eyes and seems lost in a deep study most of the time and complains of constant headaches. (Tr. p. 219). [fol. 19] In 1951 the petitioner lost his mind and had to be hospitalized at Kankakee, a State mental hospital. He had delusions that someone was going to shoot him and was foaming at the mouth. (Tr. p. 220) Prior to this, the petitioner had married and his wife had a baby.

About a year after the petitioner was out of the mental hospital, he separated from his wife. The petitioner took his baby over to his aunt's. While the aunt was at work, the petitioner shot and killed the baby and shot himself in the head. (Tr. pp. 223-224)

The petitioner was apprehended when he wandered into a police station and gave himself up. (Tr. p. 224) Just before the trial for killing his child, the petitioner was restored to sanity in the Cook County Criminal Courts Building. (Tr. p. 265). He was convicted and sentenced to the Joliet State Penitentiary for killing his child and was released from Joliet in 1956. And it was in 1958 and again in 1959, just prior to Flossie's death, that the petitioner's mother had had warrants issued for his arrest.

The state offered no evidence as to the sanity of the petitioner. It was stipulated by the State and the Defense that if one Dr. Haines, a psychiatrist were to testify, he would testify "that the defendant knows the nature of the

charge pending against him and is able to cooperate with his counsel in the defense of those charges." (Tr. p. 266)

The Court's attention was called to the fact that the petitioner had previously been committed at Kankakee. (Tr. p. 10)

The prosecuting attorney stated to the court that "Your Honor . . . now the defense raised here is such that I think we should call Dr. Haines to have his testimony as to the opinion whether this man is sane or insane . . . It is possible that he might be insane and know the nature of the charges against him and be able to cooperate with his counsel."

To the prosecuting attorney's remark, the court replied [fol. 20] "I think you have enough in the record now." (Tr. pp. 266-268)

During the trial the petitioner requested certain witnesses be subpoenaed and the Court denied him this right (Tr. pp. 208-212). The petitioner asked the court to subpoena Mr. and Mrs. Fred Moore in whose apartment a coat (containing the gun) allegedly belonging to the petitioner was found. (Tr. p. 213). The court told the petitioner that unless the defendant knew what the Moore's could testify to, the court couldn't allow the subpoena (Tr. pp. 213-214) and whether or not the coat was defendant's, defendant killed the woman and that it didn't make any difference whether the clothes belonged to defendant or not. (Tr. p. 275).

The petitioner also requested that a Dr. Keller of the Chicago Psychiatric Institute be produced to testify at his trial. (Tr. p. 52) And Dr. Keller was not summoned into court to testify—although the court ordered that a petition for a *capias* be prepared. (Tr. pp. 53-54)

The petitioner was found guilty in manner and form as charged and sentenced to the penitentiary for a term of his natural life. (Tr. p. 273)

[fol. 43]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title omitted]

ORDER GRANTING LEAVE TO FILE PETITION FOR WRIT OF
HABEAS CORPUS IN FORMA PAUPERIS—April 13, 1962

Leave to file petition for writ of habeas corpus in forma pauperis.

4/17/62 Mailed notices to Petitioner; Warden Pate, and Atty. General Clark sw.

[File endorsement omitted]

[fol. 44]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title omitted]

ORDER DISMISSING PETITION FOR HABEAS CORPUS BECAUSE OF
FAILURE TO EXHAUST STATE REMEDIES—April 18, 1962

“Order dismissing Petition for habeas corpus because of failure of relator to exhaust his state court remedies.”

[File endorsement omitted]

[fol. 48]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

Present: Honorable Julius J. Hoffman, District Judge.

[Title omitted]

ORDER DIRECTING ATTORNEY GENERAL TO FURNISH RECORD
OF STATE COURT PROCEEDINGS FOR PURPOSE OF PASSING
ON MOTION OF RELATOR TO REINSTATE HIS PETITION—
May 1, 1963

It Is Ordered by the Court that the respondent, through the Attorney General of Illinois, furnish to the Court a transcript of the record of proceedings in the State Court for the purpose of passing on the motion of the relator to reinstate his petition, such transcript to be delivered to the Court on or before May 15, 1963.

[fol. 50] Received, U. S. Marshal, 1963 May—6 PM 4:40,
N. Dist. of Ill.

[File endorsement omitted]

[fol. 51]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

Present: Honorable Julius J. Hoffman, District Judge.

[Title omitted]

ORDER VACATING AND SETTING ASIDE PRIOR ORDER DENYING
A WRIT OF HABEAS CORPUS, REINSTATING PETITION FOR
WRIT OF HABEAS CORPUS AND DENYING PETITION FOR WRIT
OF HABEAS CORPUS—May 27, 1963

The Court having examined the transcript of the record concerning relator in the State Court and being fully advised in the premises it is

Ordered that the order of court heretofore entered herein denying a writ of habeas corpus be and it hereby is vacated and set aside and that the petition of relator for writ of habeas corpus be and it hereby is reinstated, and it is

Further Ordered that said petition for writ of habeas corpus be and it hereby is denied. See *People vs. Robinson*, 22 Ill. 2d 162 (1961).

[fol. 52]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title omitted]

ORDER OF MAY 27, 1963 REINSTATING PETITION, ETC.

"After an examination of the transcript of record in the State Court, Order of Court heretofore entered denying writ of habeas corpus is vacated, the Petition is ordered reinstated and it is ordered that the same be and hereby is denied. See *People vs. Robinson*, 22 Ill. 2d 162 (1961)."

[File endorsement omitted]

[fol. 66]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title omitted]

CERTIFICATE OF PROBABLE CAUSE—June 12, 1963

I, Julius J. Hoffman, Judge of the United States District Court for the Northern District of Illinois, hereby certify that there is probable cause for an appeal in the above-entitled cause.

Julius J. Hoffman, United States District Judge.

Dated: June 12, 1963.

[File endorsement omitted]

[fol. 67]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Title omitted]

ORDER GRANTING PETITIONER LEAVE TO PROCEED
IN FORMA PAUPERIS, ETC.—June 12, 1963

Order leave to petitioner to proceed in forma pauperis. Order leave to petitioner to file notice of appeal in forma pauperis and Clerk is directed to prepare and transmit record on appeal to the United States Court of Appeals, Seventh Circuit, without payment of costs. Motion for Certificate of Probable Cause granted.

[File endorsement omitted]

[fol. 1]

IN THE CRIMINAL COURT OF COOK COUNTY
STATE OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,

—VS.—

THEODORE ROBINSON.

[fol. 4]

INDICTMENT

State of Illinois,
County of Cook, ss.:

Of the March Term of the Criminal Court of Cook County, in said County and State, in the year of our Lord, one thousand nine hundred and fifty-nine.

Count 1.

The Grand Jurors chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by authority of the People of the State of Illinois, upon their oaths present that one Theodore Robinson late of the County of Cook, on the twenty-eighth day of February in the year of our Lord one thousand nine hundred and fifty-nine in said County of Cook, in the State of Illinois afore-said, unlawfully, feloniously, wilfully and of his malice aforethought made an assault in and upon the body of one Flossie May Ward who then and there was in the peace of the People of said State of Illinois; and that said Theodore Robinson then and there unlawfully, feloniously, wilfully and of his malice aforethought discharged and shot off, to, against, towards and upon said Flossie May Ward a certain pistol commonly called a revolver, then and there

charged with gunpowder and divers leaden bullets, which pistol said Theodore Robinson then and there had and held in his hand; and that said Theodore Robinson then and there unlawfully, feloniously, wilfully and of his malice aforethought struck, penetrated and wounded said Flossie May Ward in and upon the head and body of said Flossie May Ward with one of said leaden bullets so as aforesaid discharged and shot out of said pistol by said Theodore Robinson thereby then and there with said one leaden bullet discharged and shot out of said pistol as aforesaid giving to said Flossie May Ward in and upon the head and body of said Flossie May Ward divers mortal wounds of which said Flossie May Ward thereafter died on the same twenty-eighth day of February in the year of our Lord one thousand nine hundred and fifty-nine in said County of Cook, in the State of Illinois aforesaid; and so the Grand Jurors aforesaid, upon their oaths aforesaid, say that said Theodore Robinson unlawfully, wilfully, feloniously and of his malice aforethought killed and murdered said Flossie May Ward in manner and form aforesaid and by the means aforesaid; contrary to the Statute, and against the peace and dignity of the same People of the State of Illinois.

[fol. 5] Count 2.

The Grand Jurors aforesaid, chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths aforesaid, do further present that one Theodore Robinson late of the County of Cook, on the twenty-eighth day of February in the year of our Lord one thousand nine hundred and fifty-nine in said County of Cook, in the State of Illinois aforesaid, did unlawfully with malice aforethought by shooting kill and murder Flossie May Ward, contrary to the Statute, and against the peace and dignity of the same People of the State of Illinois.

Benjamin S. Adamowski, State's Attorney.

ENDORSED

G. J. No. 124

General No. 59-793

CRIMINAL COURT OF COOK COUNTY

March Term, A. D. 1959

THE PEOPLE OF THE STATE OF ILLINOIS,

VS.

THEODORE ROBINSON.

INDICTMENT FOR MURDER

A TRUE BILL

Ralph J. Olson

Foreman of the Grand Jury

Witnesses

Robert J. McGee

Mattie Mae Golden

Neddie Betts

Robert Breckendige

Filed Mar. 12, 1959

Sidney R. Olsen, Clerk

Bail, \$ No Bail

Which said Indictment was then and there filed in the Office of the Clerk of the Criminal Court of Cook County, Illinois.

[fol. 7]

IN THE CRIMINAL COURT OF COOK COUNTY

ORDER APPOINTING COUNSEL—March 25, 1959

This day come the said People by Benjamin S. Adamowski, State's Attorney, and the said Defendant, Theodore Robinson, in his own proper person also comes.

And it appearing to the Court that the said Defendant, Theodore Robinson, is not represented by Counsel, the Court of its own motion doth appoint Attorneys Harold McDermid and Warren Carey of the Chicago Bar Association, Counsel for said Defendant in the trial of the above entitled cause.

And it appearing to the Court that the said Defendant, Theodore Robinson, is not represented by Counsel, the following proceedings were had upon Arraignment of said Defendant, Theodore Robinson, and ordered filed this day and are in words and figures following, to-wit: * * *

[fol. 16]

IN THE CRIMINAL COURT OF COOK COUNTY

PLEA OF NOT GUILTY—March 25, 1959

Whereupon the Court proceeds with the Arraignment of said Defendant, Theodore Robinson, and the said Defendant now here in open Court waives the reading of the Indictment in the above entitled cause.

And the said Defendant having been furnished with a copy of the Indictment in this cause, and lists of the names of the witnesses and Jurors, and he being now here duly arraigned in open Court and forthwith demanded of and concerning the crime alleged against him in said Indictment how he will acquit himself thereof for a plea in that behalf says, that he is Not Guilty in manner and form as charged therein and of this he puts himself upon the Country and the said People do the like.

And it is ordered by the Court that this cause be and the same is hereby assigned to the Honorable Grover C. Nie-

meyer, Judge of the Superior Court of Cook County, Illinois, and Ex-Officio Judge of the Criminal Court of Cook County, Illinois.

[fol. 21]

IN THE CRIMINAL COURT OF COOK COUNTY
COMMON LAW RECORD AND FINDING OF GUILTY AND SENTENCE

And afterwards, to-wit: on the fifteenth day of September in the year last aforesaid, it being the term of Court aforesaid, there being present Honorable Daniel A. Covelli, Judge of the Superior Court of Cook County, Illinois, and Ex-Officio Judge of the Criminal Court of Cook County, Illinois.

Benjamin S. Adamowski, State's Attorney, Frank G. Sain, Sheriff, and Sidney R. Olsen, Clerk.

The following among other proceedings were had and entered of records in said court, which said proceedings are in words and figures following to-wit:

INDICTMENT FOR MURDER

THE PEOPLE OF THE STATE OF ILLINOIS

—VS—

THEODORE ROBINSON

This day come the said People by Benjamin S. Adamowski, State's Attorney and the said Defendant as well in his own proper person as by his Counsel also comes.

Plea of Not Guilty heretofore entered to the Indictment in this cause.

And now issue being joined and the said Defendant and his Counsel now here propose to waive the intervention of a Jury and submit this cause to the Court for trial and the Court having fully advised the said Defendant of his right to a trial by Jury, said Defendant still adheres to his proposition to waive such right and by agreement between

the State's Attorney and the said Defendant and his Counsel, this cause is submitted to the Court for trial and the intervention of a Jury waived.

And the Court hearing the testimony of witnesses.

It is ordered by the Court that this cause be and the same is hereby continued until to-morrow, Wednesday, September 16th, A. D. 1959.

[fol. 22]

And afterwards, to-wit: on the sixteenth day of September in the year last aforesaid, it being the term of Court aforesaid, there being present Honorable Daniel A. Covelli, Judge of the Superior Court of Cook County, Illinois, and Ex-Officio Judge of the Criminal Court of Cook County, Illinois.

Benjamin S. Adamowski, State's Attorney, Frank G. Sain, Sheriff, and Sidney R. Olsen, Clerk.

The following among other proceedings were had and entered of records in said court, which said proceedings are in words and figures following to-wit:

INDICTMENT FOR MURDER

THE PEOPLE OF THE STATE OF ILLINOIS

—VS—

THEODORE ROBINSON

This day come the said People by Benjamin S. Adamowski, State's Attorney, and the said Defendant as well in his own proper person as by his Counsel also comes.

And the Court hearing the further testimony of witnesses.

Stipulated age of said Defendant, Theodore Robinson, is now thirty-one (31) years.

And the State's Attorney, Counsel for the People, now here rests.

And the Court hearing the further testimony of witnesses.

And Counsel for said Defendant, Theodore Robinson, now here rests.

And the Court hearing the closing arguments of Counsel and being fully advised in the premises doth find the said Defendant, Theodore Robinson, guilty of Murder in manner and form as charged in the Indictment in this cause.

And Counsel for said Defendant, Theodore Robinson, now here moves the Court for a New Trial in this cause.

And the Court hearing Counsel for said Defendant in support of said motion for a New Trial in this cause as well as the State's Attorney, Counsel for the People, in opposition thereto, and the Court being fully advised in the premises, doth overrule said motion and orders that said motion for a New Trial be and the same is hereby overruled [fol. 23] accordingly.

And Counsel for said Defendant, Theodore Robinson, now here moves the Court in Arrest of Judgment in this cause.

And the Court hearing Counsel for said Defendant in support of said motion as well as the State's Attorney, Counsel for the People, in opposition thereto, and the Court being fully advised in the premises, doth overrule said motion and orders that said motion in Arrest of Judgment be and the same is hereby overruled accordingly.

And now neither the said Defendant, Theodore Robinson, nor his Counsel for him saying anything further why the Judgment of the Court should not now be pronounced against him on the Finding of guilty, heretofore entered, and the Judgment rendered to the Indictment in this cause.

Therefore, it is considered, ordered and adjudged by the Court that the said Defendant, Theodore Robinson, is guilty of the said crime of Murder in manner and form as charged in the Indictment in this cause, on the said Finding of Guilty, and that he be and is hereby sentenced to confinement at hard labor in the Illinois State Penitentiary for said crime of Murder in manner and form as charged in the Indictment whereof he stands convicted and adjudged guilty, for the term of Natural Life from and after the de-

livery of the body of said Defendant, Theodore Robinson, to the Illinois State Penitentiary, and that the said Defendant, Theodore Robinson, be taken from the bar of the Court to the Common Jail of Cook County, from whence he came and from thence by the Sheriff of Cook County to the Department of Public Safety and the said Department of Public Safety is hereby required and commanded to take the body of the said Defendant, Theodore Robinson, and confine him in said Penitentiary, in safe and secure custody, for and during the term of Natural Life from and after the delivery thereof, at hard labor, and that he be thereafter discharged.

[fol. 24] It Is Further Ordered that the said Defendant pay all the costs of these proceedings, and that execution issue therefor.

[fol. 29]

IN THE CRIMINAL COURT OF COOK COUNTY, ILLINOIS

Indictment No. 59-793

MOTION FOR TRANSCRIPT UNDER ILLINOIS RULE 65-1
AND ORDER THEREON—September 22, 1959

May It Please the Court:

Now comes Theodore Robinson, the movant in the above entitled cause of action, and respectfully present unto this Honorable Court the following, to-wit:

(1) That on the 16th day of September 1959 A.D., he was tried and convicted in a bench trial before the Hon. Daniel A. Covelli, of the Criminal Court of Cook County, wherein he was charged in Indictment No. 59-793, for the offense of murder.

(2) That he feels he was denied a fair and impartial trial by the Court—because of the fact, the Court denied him the opportunity as it was promised in open session before witnesses the right to subpoena any witnesses vital to the defense or the prosecution at the beginning of his hearing.

(3) Defendant states that he is illiterate in the profession of law, being a layman, and was kept under the opinion he was being granted a pre-trial preliminary hearing as requested. As no plea was asked nor entered, he had no reason to doubt the word and advice of his attorney.

(4) Defendant states he feels that he was ineffectively assisted by Counsel appointed him by the Court, who he feels aided the State in effect to gain his conviction.

(5) Counselor did not use the prearranged formula for defense.

(6) Counselor denied him the right to take the stand in his own defense, as requested. Defendant now charges that Counselor instructed him to go before the bench that he might be heard by the Court, whereas sentence was imposed before he had a chance to say a word or reach a respected position before the Judge.

Your Movant feels that he has a worthy cause of action to present to the Illinois Supreme Court for review of the conviction mentioned herein above. Therefore he appeals to the Court to grant him his records in this matter, so he can appeal his case in a legal form from said records. He humbly prays that his Motion for Transcript be allowed and same be entered as part of the records.

This he forever Prays.

Respectfully submitted,

Theodore Robinson.

Theodore Robinson, Reg. No. 230872 A-1, Cook County Jail, Chicago, Illinois.

[fol. 30] And the Court hearing Counsel in support of said motion and being fully advised in the premises, doth sustain said motion and orders that said motion for a Transcript of the Proceedings at the trial of said Defendant, Theodore Robinson, under the Illinois Supreme Court Rule 65-1 be and the same is hereby allowed.

[fol. 47]

IN THE CRIMINAL COURT OF COOK COUNTY

[Title omitted]

TENDER AND APPROVAL OF BILL OF EXCEPTIONS

This day come the said People by Benjamin S. Adamowski, State's Attorney, and the said Defendant by his Counsel also comes.

And Counsel for said Defendant, Theodore Robinson, tenders his Bill of Exceptions to the Court, which said Bill of Exceptions is signed and sealed by the Judge of this Court, and order filed this day, which is accordingly done.

Report of Compliance filed in the above entitled cause; which said Report of Compliance is in words and figures following, to-wit:

[File endorsement omitted]

[fol. 48]

IN THE CRIMINAL COURT OF COOK COUNTY

[Title omitted]

REPORT OF COMPLIANCE—Filed June 3, 1960

I, Lewis Y. Matsuoka, Official Shorthand Reporter of the Criminal Court of Cook County, do hereby state that on the 3rd day of June, A.D. 1960, the original Bill of Exceptions in the above-entitled cause was filed with the Clerk of this Court; that on the 3rd day of June, A.D. 1960, a copy of said Bill of Exceptions was mailed to the defendant, which was done pursuant to Rule 65-1.

Lewis Y. Matsuoka, Official Shorthand Reporter,
Criminal Court of Cook County.

[File endorsement omitted]

[fol. 50]

IN THE SUPREME COURT OF ILLINOIS

WRIT OF ERROR—September 26, 1960

State of Illinois)

Supreme Court) ss.

THE PEOPLE OF THE STATE OF ILLINOIS

*To the Clerk of the Criminal Court of Cook County**Greeting:*

Because, in the Record and proceedings, as also in the rendition of the judgment of a plea which was in the Criminal Court of Cook County (59-793) before the Judge thereof, between People State of Illinois and Theodore Robinson it is said manifest error hath intervened, to the injury of the aforesaid Theodore Robinson as we are informed by his complaint, and we being willing that error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the Record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Springfield, on or before twenty days from the date hereof, that the Record and proceedings, being inspected, we may cause to be done therein to correct the Error, what of right ought to be done according to law.

Witness, The Hon. Walter V. Schaefer, Chief Justice of our Court, and the Seal thereof, at Springfield, this 26th day of September, in the year of our Lord one thousand nine hundred and sixty.

(Seal)

Mrs. Earle Benjamin Searcy, Clerk, Supreme Court of the State of Illinois.

[fol. 52]

IN THE CRIMINAL COURT OF COOK COUNTY

September Term, A.D. 1959.

Indictment No. 59-793.

Charge: Murder.

State of Illinois,
County of Cook, ss.

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

THEODORE ROBINSON

Bill of Exceptions

Be it remembered that heretofore, on to-wit the 15th day of September, A.D. 1959, the same being one of the days of the September Term of said Court, this cause came on for trial before the Honorable Daniel A. Covelli, Judge of said Court, upon the indictment heretofore filed herein, and defendant having entered a plea of not guilty.

APPEARANCES:

Hon. Benjamin S. Adamowski, State's Attorney of Cook County, By Mr. Robert M. Conley and Mr. Michael Greenfield, Assistant State's Attorneys, on behalf of the People;

Mr. Warren J. Carey and Mr. Harold E. McDermid, on behalf of the Defendant.

[File endorsement omitted]

[fol. 53] **COLLOQUY BETWEEN COURT AND COUNSEL**

The Clerk: Theodore Robinson.

Mr. McDermid: Good morning, your Honor. My name is McDermid for the record. Warren Carey is downtown and will come out when the time is proper.

The Court: Well, we will be ready for him in about an hour. You call him. It will follow the case on trial. A bench or jury?

Mr. McDermid: He discussed that matter with the defendant and I didn't find out what the result of the conference was.

The Court: Mr. Robinson, have you decided whether you want a jury or bench trial?

The Defendant: No, sir, I haven't.

The Court: All right, pass it. About 11:00 o'clock, we will go to trial.

Mr. McDermid: Could we have a call of the witnesses at this time to see if a capias would have to be issued or not? There was a subpoena duces tecum issued to Dr. Kelleher, Chicago Psychiatric Institute, and as yet we have heard no response from them. I think I will call—

The Court: Call him.

Mr. McDermid: Mr. Warren Carey asked me to prepare a petition for a capias.

[fol. 54] The Court: All right, prepare a petition for a capias.

Mr. McDermid: Thank you very much.

The Court: It will follow the case on trial, about 11:00 o'clock.

Mr. McDermid: Will I be permitted to confer with my man?

The Court: Yes.

(After an interval of time, the following proceedings were had:)

The Clerk: Theodore Robinson.

Mr. McDermid: Mr. Carey has not been here, and I believe we will be waiving the jury but I think the defendant has to decide that. However, he does want to confer once more with Warren Carey before he does that.

The Court: Very well.

Mr. McDermid: I think we will be ready to proceed at your pleasure.

The Court: We are ready right now, if you are ready. Are you ready?

Mr. McDermid: No, I would like to wait for Warren Carey.

The Court: Which case are we going to try first?

Mr. Conley: Indictment 59-793. I informed Mr. Carey [fol. 55] of our election.

The Court: 793, all right.

Mr. McDermid: If we could have a ten minute recess, I think Warren Carey will be ready, and we will be ready.

The Court: Has he left his office?

Mr. McDermid: I am sure he has because I called him.

The Court: Take the prisoner back. We will wait until the lawyer gets here.

(After a short interval of time, the following proceedings were had:)

The Court: Call the case, please.

The Clerk: Theodore Robinson.

The Court: The State has chosen to try 793. Are you ready?

Mr. Carey: Yes, Judge.

The Court: Mr. Robinson, you understand you are entitled to a trial by a jury?

The Defendant: Yes, I do.

The Court: Do you wish a jury trial?

The Defendant: No, sir.

The Court: Have him sign a waiver.

Mr. Carey: While he is signing that, Judge, a few things [fol. 56] I would like to discuss with the Court.

The Court: Yes.

Mr. Carey: Namely, records were brought up from Kankakee State Hospital and I have given them to the State's Attorney. He has examined them and we have a stipulation that they will be allowed into evidence without the proper proof. And also I have seen the protocol prepared by the Coroner's physician and I have stipulated to the reading of that rather than the calling of the Coroner's physician. Is that right, Mr. Conley?

Mr. Conley: Well, we will stipulate to the records from Kankakee, but we might choose to call the Doctor rather than stipulate as to the cause of death.

Mr. Carey: All right. I thought that was agreed.

The Court: All right, very well.

Mr. Conley: One other thing, Mr. Carey. I understand, your Honor, that there are four eye witnesses to this occurrence, two of which are here. Now, the list of witnesses was furnished to Mr. Carey some time ago which did not include one of the witnesses who is present in court today. However, Mr. Carey knows about this witness, Jimmy Hackman. In fact, I showed Mr. Carey the statement that Jimmy Hackman made to the police and Mr. Carey read it. [fol. 57] Mr. Carey: Just so I have an opportunity before he takes the stand to talk to him. Is he going to be your first witness?

Mr. Conley: No, our second witness.

Mr. Carey: Well, during the recess, I can talk to him.

The Court: During the luncheon recess, you talk to him. Make him available.

Mr. Conley: Yes, sir.

The Court: File the jury waiver.

The Clerk: All the witnesses in the Theodore Robinson case, please step forward.

Will all the witnesses please raise your right hand, and the defendant also.

(Witnesses sworn.)

Mr. Carey: Motion to exclude witnesses.

The Court: All witnesses will retire to the witness room until called. Go with the bailiff, please.

Mr. Conley: Your Honor, may we have one police officer?

The Court: One police officer may remain. You may proceed.

Mr. Conley: Yes, sir.

Mr. Carey: Just one more thing. The State's Attorney said he had a witness under subpoena by the name of [fol. 58] Neddie Batts. Is she here?

Mr. Conley: She is here. She is in the witness room.

Mr. Carey: Fine. We might want to use her.

The Court: Very well.

(Thereupon the People, to maintain the issues in this cause, offered and introduced the following evidence, to-wit:)

Mr. Conley: Take the stand.

MATTIE MAE GOLDENS, a witness called on behalf of the People, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Conley:

Q. What is your name, please?

A. My name is Mattie Mae Goldens.

The Court: Mary?

The Witness: Mae Goldens.

The Court: Spell it.

The Witness: G-o-l-d-e-n-s.

By Mr. Conley:

Q. Now, will you please keep your voice up, Mrs. Goldens, so we can all hear you. Where do you live?

[fol. 59] A. I live 4859 Calumet.

Q. Are you married or single?

A. Single—married.

Q. Now, what relation if any was Flossie Ward to you?

A. My sister.

Q. Do you know where she lived at?

A. She lived at the time, it was 75th and Eggleston.

The Court: What is the name of the street?

Mr. Conley: Eggleston.

Q. Now, prior to February 28, 1959, when was the last time you saw Flossie Ward?

A. That Wednesday.

Q. The Wednesday preceding—

A. That's right.

Q. —the 28th?

A. That's right.

Q. By the way, do you recall what day the 28th was?

A. I don't know. That would be the Saturday.

Q. That would be a Saturday?

A. Certainly. On a Wednesday, the Wednesday I seen her.

Q. You saw her prior, the Wednesday preceding, is that [fol. 60] right?

A. That's right.

Q. Which would be the 25th of February, and where did you see her?

A. At my home.

Q. What condition was she in at that time?

A. She was well when I seen her at that time.

Q. Was she alive?

A. Yes.

Q. And when did you next see her or her body after that?

A. February 28th.

Q. February 28, and where did you see her?

A. In Miller's Funeral Home.

Q. Where is that located?

A. That's 63rd. I disremember whereabouts but it is on 63rd.

Q. What was her condition then?

A. She was dead.

Q. Both of these dates, the 25th and 28th of February were 1959, is that right?

A. That's right.

Q. Now, do you know the defendant in this cause Theodore Robinson?

A. Yes, I know him.

[fol. 61] Q. You see him in court here?

A. Yes.

Q. He is the man sitting at the counsel table, is that right?

A. That's right.

Q. How long have you known him?

A. I will say I have been knowing him about going on four years now.

Q. What if any relationship did he have to your sister Flossie Ward?

A. He was her boy friend.

Q. Her boy friend?

A. That's right.

Q. Do you know where he lived during those four years?

A. No, I just—I don't know where he was living during the four years but he recently staying with her over here.

Mr. Carey: I am sorry, I did not understand.

The Witness: I don't know where he was living but he would, you know, come over to see her and then they start living together.

By Mr. Conley:

Q. How long did they live together?

A. I say they lived together about a year, I guess.

Q. And about when would that be during that four years [fol. 62] preceding February 28, 1959, toward the end of that period or toward the beginning of the four year period?

A. Where was she living?

Q. While they were living together?

A. Lived at 816 East 57th Street.

Q. Do you know what year that was?

A. No.

Q. 1958, 1957, 1956?

A. 19—I think about '57.

Q. Do you know how long they lived together?

A. I will say about a year.

Q. When was the last time prior to February 28, 1959, that you saw Robinson?

A. I disremember when the last time I seen him because I didn't allow the man in my house. He didn't come to my house.

Mr. Carey: Object and move to strike it out.

The Court: Strike it out. Read the question to the witness.

(Question read.)

By Mr. Conley:

Q. If you can remember?

A. Well, I just can't remember when the last time I seen him.

Q. And did you ever know of any trouble between Robinson [fol. 63] son and your sister?

Mr. Carey: Objection.

The Court: Sustained. It calls for a conclusion.

Mr. Conley: I have no further questions.

The Court: Cross examine.

Cross examination.

By Mr. Carey:

Q. Mrs. Goldens, is that correct?

A. That's right.

Q. Now, you have known Theodore Robinson for about four years, is that correct, prior to last February—

A. Yes, that's about right, I say going on about four years. I don't know exactly.

Q. I understand. Around four years?

A. Around maybe four years now.

Q. And during that time, your sister Flossie Ward and Theodore lived together as husband and wife, is that correct?

A. That's right.

Q. And they lived at 816 West 57th Street?

A. 816 East 57th.

Q. And did you have occasion to ever visit them while they lived together?

A. Well, I did.

Q. How many times would you say during the period of [fol. 64] a year that they lived together that you visited with them?

A. Well, I didn't visit her—not too much.

Q. Now, during the period of the four years that you have known Theodore Robinson, how many times have you had occasion to see him? Would you see him once a week, once a month? You understand what I am talking about?

A. Well, just like I told him, I didn't never see—I didn't never be around him too much.

Q. Now, when you say you weren't around him too much, could you tell us just how often you would see him?

A. I guess about once a month, I will say.

Q. During that time, would you see him at your home or at their home or where would you see them or see him?

A. Well, most times was at her home.

Q. At where?

A. At her home, her home.

Q. How often—how long a period of time would you see him?

A. Well, sometime I go over there and stay sometime after, you know, after I come from work or something like [fol. 65] that.

Q. Well, would it be a couple of hours at a time?

A. Yes, about a couple of hours.

Mr. Carey: There will be no further questions.

Mr. Conley: You may step down, Mrs. Goldens.

(Witness excused.)

Mr. Conley: Would you call Miss Neddie Batts, please.

The Court: You have been sworn, haven't you?

The Witness: Yes, sir.

The Court: Be seated.

NEDDIE BATTS, a witness called on behalf of the People, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Conley:

Q. What is your name, please?

A. Neddie Batts.

Q. Will you spell the last name, please?

A. B-a-t-t-s.

Q. And the first name?

A. Neddie, N-e-d-d-i-e.

Q. N-e-d-d-i-e?

[fol. 66] A. Right.

Q. Will you please keep your voice up, Miss Batts, so that we can all hear you. That's Miss Batts, isn't it?

A. Yes.

Q. Where do you live, Miss Batts?

A. 3939 Lake Park.

Q. Where are you employed?

A. Right now I am employed at Herman's Nursing Home.

Q. On February 28, 1959, where were you employed?

A. At Collins Barbecue House.

Q. Where is that located?

A. It's in 1000 block on 63rd Street. I don't know the correct address.

Q. In the 1000 block on 63rd Street?

A. That's right.

Q. That is in Chicago, Illinois?

A. Yes, it is.

Q. And how long prior to February 28 had you been employed there?

A. Oh, about a month, about four weeks.

Q. About a month?

A. Yes.

Q. And did you know the deceased in this cause, Flossie [fol. 67] Ward?

A. Yes, we worked together. We were working there.

Q. She worked there too?

A. Yes.

Q. Did she start to work there after you started or had she been working there when you started?

A. She was there when I started.

Q. What shift did you work?

A. Second shift.

Q. What hours did that include?

A. From ten to four.

Q. Ten p. m.?

A. Yes.

Q. To four a. m.?

A. That's right.

Q. What shift did Flossie Ward work?

A. The same shift, from ten to four.

Q. Now, this barbecue house is located on which side of 63rd Street, the north or south?

A. On the south side.

Q. And about how big is this restaurant?

A. Oh, it isn't too big. Oh, it's about 25 by 25, I would say.

Q. Would you say about the distance from you to about —(indicating)

[fol. 68] A. Yes.

Mr. Conley: Indicating about 25, 30 feet?

Mr. McDermid: What is the question?

Mr. Conley: The distance from the witness to me.

Mr. Greenfield: The size of the restaurant.

Mr. McDermid: Is that the size of the restaurant or the depth of the restaurant?

By Mr. Conley:

Q. Is this restaurant square or oblong?

A. Oblong, more or less.

Q. Well, from the door where you come in off the street to the back, about how long is the distance?

A. About from here, right where you are standing.

Q. About from you to me?

A. Yes.

Q. And from side to side, would it be more than that or less?

A. It was about the same. There isn't too much difference over there with the table and the counter and all.

Q. Is there a back portion to this restaurant?

A. Yes, there is.

Q. Would this 25 feet include that back portion or would that be in addition to the 25 feet?

A. No, that wouldn't include that.

[fol. 69] Q. It would be included?

A. No.

Q. And how much farther back was the back part?

A. It isn't too far. About—you have to go around the counter to get to the back.

Q. Well, would you say ten feet or twenty feet?

A. Yes.

Q. And it is about twenty-five feet from side to side too as you go in the door, is that right?

A. Yes.

Q. Now, can you describe the interior of this restaurant further as to the tables, if any, and counter, if any?

A. Yes. They have—must have three or four tables on one side and a counter is on the other—on the other side.

Q. As you go in off the street, on which side is the table on?

A. On the right side.

Q. And which side is the counter on?

A. On the left.

Q. And what type of a counter is this; is it straight or circular?

A. It is a circle counter.

Q. And did you work behind the counter or back and [fol. 70] forth?

A. I worked behind the counter.

Q. Where did Flossie Ward work?

A. She worked behind the counter.

Q. And at the counter, were there stools there along the counter?

A. Yes, there was.

The Court: We will stop here. Recess until two o'clock.

(Thereupon, said cause was recessed until 2:00 o'clock p. m. of the same day, Tuesday, September 15, 1959.)

[fol. 71]

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

THEODORE ROBINSON

Before Judge Daniel A. Covelli.

Tuesday, September 15, 1959, 2:00 o'clock p.m.

Court met pursuant to recess.

Present: Same as before.

The Court: Call the case, please.

The Clerk: Theodore Robinson.

The Court: You may proceed.

Mr. Conley: Miss Batts, will you take the stand?

NEDDIE BATTS, a witness called on behalf of the People, having been duly sworn, resumed the stand, was examined and testified as follows:

Direct examination.

By Mr. Conley (continued):

Q. What is your name, please?

A. Neddie Batts.

Q. Now, keep your voice up again, Miss Batts. You were doing good before. You are the same Needie Batts that testified before we recessed, aren't you?

A. That's right.

[fol. 72] Q. And you realize you are still under oath?

A. Yes.

Q. And you didn't talk to me during the recess except when I told you that Judge Covelli takes the bench promptly?

A. No, I didn't talk to you.

Q. Now, do you know the defendant in this cause, Theodore Robinson?

A. Yes, I know him.

Q. How long have you known him, prior to February 28?

A. I had been knowing him for about four weeks.

Q. For four weeks?

A. Yes.

Q. Will you please keep your voice up, Ma'am?

Mr. Carey: Was that four weeks or four years?

The Witness: About four weeks.

By Mr. Conley:

Q. And how long did you tell us that you had been employed in this restaurant?

A. About four weeks.

Q. That was prior to February 28, 1959, is that right?

A. That's right.

Q. During those four weeks, about how many times would you say that you saw Robinson?

[fol. 73] A. Well, I couldn't say exactly. He was—

Q. To the best of your recollection?

A. Oh, he would come pick Mrs. Ward up sometime from work.

Q. He would pick up Flossie Ward?

A. Yes.

Q. And what time of the day or night would he pick her up?

A. Oh, she would get off at four o'clock and he would come by sometime to—to have lunch, dinner.

Q. How long before February 28, 1959, did you see him? When did you see him last?

A. When did I see him last?

Q. Yes.

A. I believe it was that Thursday night because I was off from work that Friday. That Friday night was my night off.

Q. You think it was Thursday night?

A. I am quite sure.

Q. Now, you see the man in court today that you knew as Theodore Robinson?

A. That's right.

Q. Would you point him out, please?

A. That's him.

Q. That is the gentleman on the other side of the table [fol. 74] in the middle?

A. Yes.

Q. Indicating the defendant Robinson. Now, on the night of February 28, what time did you come to work?

A. We would get there around eight o'clock.

Q. About eight o'clock?

A. Yes.

Q. And did you have occasion to see the defendant about ten-thirty?

A. Yes.

Q. That's a. m. or p. m.?

A. A. m.

Q. That is in the night?

A. In the night.

Q. That would be p. m., right?

A. Yes, right.

Q. Will you please describe for the Judge just what happened at about 10:30 p. m. on February 28, 1959?

A. Yes, I will. We had just come in and started working. And we got—started work around ten.

Q. By "we", whom do you mean?

A. Flossie and myself and Jimmy, and the other shift was ready to go off. And we was getting all of our stuff together and it wasn't long before I seen the man rushing [fol. 75] in and jumped over the counter.

Q. And what happened then?

A. And I heard Flossie who said, "Don't start nothing tonight."

Q. By the man, whom are you referring to?

A. Ted Robinson, and she said, "Don't start nothing tonight."

Q. Is that the man you identified as Theodore Robinson?

A. That's right.

Q. What if anything did Ted say?

A. I didn't hear Ted say anything.

Q. What if anything did Flossie say?

A. And she said, "Don't start nothing tonight, Ted."

Q. What if anything did Ted do?

A. When he jumped over the counter, I heard shots.

Mr. Carely: Objection.

The Court: Sustained. It is not responsive. The question is, what did Ted do.

Mr. Conley: May the jumping over the counter stand?

The Court: That may stand.

Mr. Carey: Objection.

By Mr. Conley:

Q. And he jumped over the counter?

A. Yes.

Q. And what if anything did Flossie do?

A. Flossie, she said, "Ted, don't start nothing tonight," [fol. 76] and she tried to get behind Jimmy.

Q. What if anything did you see or hear?

A. I heard shots.

Q. Then what happened after that?

A. Well, Flossie jumped over the counter.

Q. Which way? She was behind the counter at this time?

A. Yes.

Q. And she jumped—

A. Over the counter near the front door.

Q. Yes.

A. And Ted jumped over the counter and they run out of the place.

Q. And that is the last you saw of them, is that right?

A. That is the last I saw of them, yes.

Q. Did you see either one of them go out the door?

A. No, I didn't.

Q. What did you do after you saw them jump over the counter and you saw—and you heard the shots?

A. When I saw him come by, I went to the back. There is a small place, and when I got a chance I went in the back and went down in the basement.

Q. How many times did Flossie say, "Don't start nothing tonight"?

[fol. 77] A. Just once. I only heard it one time.

Q. And did you see either Flossie or Ted after that?

A. No, no more than until that night they called us down to identify Ted.

Q. And what night was that?

A. That was the Sunday night.

Q. And who called you down?

A. They called us from the police station.

Q. The police, and where did they call you?

A. I was home. They called me at home.

Q. Where did they tell you to go?

A. Hyde Park station.

Q. Police station?

A. Yes.

Q. And at the police station, what did you do?

A. We went down and they had a lineup there and they asked us to identify Ted, asked me to.

Q. What if anything did you do when you saw the lineup?

A. Well, when they asked me to identify him, I know Ted so I identified him.

Q. How far were you from Ted at that time?

A. About as far from Ted from here.

[fol. 78] The Court: How far? How many feet for the record?

Mr. Conley: Would you please read the last answer?

(The answer was read by the Reporter.)

The Court: Indicating how many feet, fifteen, twenty?

By Mr. Conley:

Q. Would you say from you to here?

A. Yes; just a small room.

Q. Or less distance from you to me?

A. No.

Q. About the same?

A. Yes.

The Court: That would be ten, twelve feet. Is that correct, counsel?

Mr. Carey: Yes, sir.

The Court: All right.

By Mr. Conley:

Q. And what did you say then, Miss Batts?

A. Well, I told them that it was Ted, the same night, I had seen him that Saturday night; the Ted that I know.

Q. Would you talk louder.

A. I told them that it was Ted.

Q. Did you say anything else at that time?

A. No, that was all.

[fol. 79] Q. And did you hear him saying anything at that time?

A. No.

Q. Now, how was Ted dressed when he came into the restaurant on the 28th?

A. He had on a dark topcoat, I believe, with a brown hat.

Q. And how was he dressed when he was in the station?

A. I believe he had on a brown leather jacket.

Q. And all that you testified to happened in Chicago, Illinois, is that right?

A. That's right.

Mr. Conley: Your witness.

Cross examination.

By Mr. Carey:

Q. Miss Batts, on the evening in question which is the 28th of February, 1959, it was a Saturday, is that correct?

A. That's right.

Q. Did you say you started to work at 10:00 o'clock on that evening?

A. Yes.

Q. But all the other nights you started at 8:00, is that correct?

[fol. 80] A. No, we had to get there and get our stuff together before we started working.

Q. So you spent two hours there previously, is that correct?

A. Just about that, yes.

Q. Now, when you came to work, do you go to work with Flossie?

A. No, I didn't.

Q. Now, was she at work when you got there?

A. Yes, she was.

Q. And you got there about would you say at quarter to eight or so or before 8:00 o'clock on that evening?

A. Oh, about ten minutes to eight.

Q. So you worked with Flossie for two hours or more before Ted, the man you identify as Ted, came, is that correct?

A. That's right.

Q. Now, is the place open at that time?

A. Yes, it is.

Q. When you say about preparation, what do you mean by that?

A. Well, you have to get your meat together. You have, you know, get it prepared for cooking. You have to get your potatoes—

[fol. 81] Q. That is the back room preparation?

A. That's right.

Q. Now, was Jimmy Hackman, is that his name, Jimmy Hackman, the chef?

A. Yes. He was there.

Q. And he was there also?

A. Yes.

Q. Now, had you had occasion to talk to Miss Ward during the two and a half hours while you were there before 10:30?

A. No, not talk with her.

Q. You didn't talk with her?

A. No.

Q. Now, you say that you knew Flossie for about two weeks?

A. About four weeks.

Q. Excuse me, about four weeks?

A. Yes.

Q. And you also met Ted about that time, is that correct?

A. That's correct.

Q. Now, other than your working association with Flossie, did you have occasion to be with her at any other time?

[fol. 82] A. No. They had taken me home couple of times at night when we get off.

Q. But you never visited with them socially?

A. No, not at any time.

Q. Do you know what the relationship was between Ted Robinson and Flossie?

A. They were going together, I guess.

Q. Do you know if they lived separate and apart or did they live together?

A. That I couldn't say.

Q. Now, did you see Ted every night that Flossie worked?

A. I wouldn't say I seen him every night.

Q. Would you see him most of the time? Did he pick her up most of the time she worked?

A. Yes.

Q. He would come there and have his meals, is that correct?

A. No. I wouldn't say he come there and have his meal but sometimes he would have something to eat.

Q. And you would leave around 4:00 o'clock in the morning, is that correct?

A. That's right. That's right.

Q. Now, do you know a man by the name of Mr. Ward?
[fol. 83] A. Mr. Ward? No, I don't.

Q. Now, did you have occasion to see—it's Flossie Ward, isn't it?

A. That's right.

Q. Did you have occasion to see Flossie Ward and Robinson and another man about a week prior to the 28th of February?

A. Yes, I did.

Q. And did you see them across the street from the barbecue place?

A. Yes.

Mr. Carey: Would you mark this Defendant's Exhibit 1 for identification?

(Thereupon said document was marked Defendant's Exhibit No. 1 for identification.)

Q. Did anything unusual occur during that meeting?

A. Yes, they had some words.

Q. Who had some words?

A. Well, I guess it was Flossie and Ted and the fellow.
The first time—

Q. Do you know who the fellow was?

A. No, I had never seen him before.

Q. Do you know if he was related in any way to Flossie?

[fol. 84] A. That I couldn't say.

Q. During the course of this, did Ted receive any injury?

A. No, not that I know of.

Q. Well, did you have occasion—you saw Ted on the 28th of February?

A. Yes.

Q. And you saw him also on the Sunday following, is that correct?

A. The Sunday night.

Q. Now, the 28th is a Saturday and it occurred in the morning, is that correct? This incident you are talking about, about 4—excuse me, Judge. I would like to withdraw that.

The Court: All right.

By Mr. Carey:

Q. This occurred in the evening on Saturday, is that correct, around 10:00 o'clock or 10:30?

A. Around 10:30.

Q. So that twenty-four hours later, you saw Ted in the police station? Would that be about right?

A. Yes.

Q. The following day and evening?

[fol. 85] A. Sunday night, Sunday night.

Q. You were about ten to twelve feet away from him at that time?

A. Yes.

Q. And it was well lighted?

Q. Yes, it was.

Q. And you also saw him at the barbecue place and that is a well lighted place, isn't it?

A. Yes.

Q. Now, what is the closest you were to Ted in the police station in feet? Would that be about ten or twelve feet?

A. Yes.

Q. Now, did you notice anything unusual about Ted's appearance at the police station?

A. No.

Q. Did you notice in particular a mark on his head?

A. No, I didn't.

Q. Now, I show you Defendant's Exhibit 1 for identification which purports to be a picture and ask you if you know who that is?

A. Yes.

Q. Who is it, please?

[fol. 86] A. Ted.

Q. And did he look that way on the 28th day of February, 1959, at the time you saw him—the 29th day?

Mr. Conley: That's leap year. 28.

By Mr. Carey:

Q. On the 1st day of March, 1959, at the police station?

A. Did he look like this?

Q. Yes.

A. Yes, he did.

Q. Now, during the time—

Mr. Conley: Just a minute. There is an objection, your Honor, to "Did he look like this". I don't think that is specific enough.

The Court: As I see it, counsel has a card or document marked Defendant's Exhibit 1 for identification which has on it a photograph, and I suppose you are referring to the photograph—

Mr. Carey: Yes.

The Court: —in asking the question. Show it to counsel so he will know what you are talking about.

Mr. Conley: I will withdraw the objection, Judge.

The Court: Very well, objection withdrawn.

By Mr. Carey:

Q. At the time that you saw Ted and this man whom you [fol. 87] do not know and Flossie across the street, did you see any gun or knife or club or anything at that time?

A. No.

Q. Now, what time of the day did this incident occur? I am talking now about across the street?

A. It was after we got off from work around—

Q. Was that after 4:00 o'clock in the morning, is that correct?

A. Yes.

Q. And did you go over together?

A. No. We—

Q. How far away were you?

A. Over there by the barbecue house.

Q. And did you leave before they left?

A. We all left about the same time.

Q. Did you leave together?

A. No.

Q. Now, this counter that you talk about in the barbecue place, how high is that, do you know?

A. It is about waist high when you stand.

Q. Is it as high as this?

A. Yes.

Q. I am referring to the bench in front of the jury box.

[fol. 88] It is about three feet or so, Mr. State's Attorney?

Mr. Conley: Yes.

Mr. Carey: Indicating for the record about three feet.

Q. Does that counter run like an "L"?

A. Yes.

Q. Does part of it run towards the back of the barbecue place?

A. Yes.

Q. Where was Flossie in reference to the counter when Ted came in?

A. She was up here, the front where the fryer is.

Q. Is that the smaller part of the "L"?

A. No, that's the large part.

Q. How long in feet is that large part of the "L"?

A. Oh, about fifteen feet, I imagine.

Q. And about how long is the base part of the "L"?

A. Oh, about five feet, I guess. It isn't too long.

Q. Now, Flossie was up in the front near where the preparations are made, is that correct?

[fol. 89] A. Yes.

Q. And how close is that to the door?

A. The front door or the back? To the front door?

Q. Yes.

A. It isn't too far. It's about I will say about three or four feet from the front door but she was on the other side of the counter.

Q. Was the door open or closed at that time?

A. It was closed, I imagine, because—

Q. Now, did you see the man that you identify as Ted outside on the street?

A. No, I didn't.

Q. And the first time you saw him, where was he with reference to the counter?

A. He was jumping over the counter when I seen him.

Q. And had you been in the store all of that time?

A. Yes.

Q. Where were you in reference to the counter?

A. I was between the long part and the small part, in the "L" of the counter.

Q. Between the long part—

A. Yes, I was preparing an order of barbecue to take out.
[fol. 90] Q. Were you in between the man you identify as Ted and Flossie?

A. Yes, I was.

Q. And that would mean then that—I will refer to him as Ted, was at the short part of the "L", is that correct?

A. No, he come in at the long part.

Q. Yes.

A. And he come up, passed me and went to the short part of the "L".

Q. In other words, he went by Flossie, is that correct?

A. No, by me.

Q. By you?

A. Yes.

Q. And he went to the short part of the "L", is that right?

A. Yes.

Q. At that time, Flossie was up at the—where you prepare things, that would be at the long part of the "L"?

A. Yes, that's the long part of the "L".

Q. And you were between the long part and the short part, is that correct?

[fol. 91] A. Yes.

Q. And Ted was on the other side?

A. No, Ted when he jumped over the counter, we were all on the same side of the counter.

Q. How close were you to one another in distance, in feet?

A. Flossie?

Q. No, all of you together? How far were you from Flossie?

A. I wasn't too far away from Flossie.

Q. Well, in feet?

A. About one or two feet.

Q. And how far were you from Ted?

A. When Ted jumped over the counter, he rushed up from where he was.

Q. Well, how far was the place where Ted jumped over the counter to you? Do you understand what I mean?

A. No, I couldn't.

Q. You say Ted jumped over the counter?

A. Yes, and he come—

Q. How far was that in feet away from you, the point where he jumped over the counter?

A. About three feet, I guess.

[fol. 92] Q. So you were all pretty close to him?

A. Yes, just a small place.

Q. The only thing you heard in the way of conversation was what you testified Flossie said?

A. That's right.

Q. Now, Jimmy Hackman was where?

A. He was over behind the counter too.

Q. Were you all in the same group?

A. Yes.

Q. Now, did you look at Ted at that time?

A. No, I didn't.

Q. Did you look at Ted at any time while this was occurring?

A. When he jumped over the counter, I looked at him.

Q. He said nothing?

A. No.

Q. And which way was he looking?

A. Up towards where we were because the way he was coming—

Q. Did you notice anything unusual about him?

A. Yes. He jumped over the counter. That was unusual.

Q. Well, about his appearance, not about his actions?

[fol. 93] A. No, no.

Q. Now, he had on a hat?

A. Yes.

Q. And he had on a coat, is that correct?

A. Yes, that's correct.

Q. Now, during this incident, you passed him, didn't you?

A. No, I didn't pass him. He come by me.

Q. He passed you?

A. He passed me.

Q. When he passed you, how close was he to you?

A. He was within reaching distance to me.

Q. A few feet?

A. Yes.

Q. And he said nothing to you?

A. No.

Q. After he passed you, then you went in the direction that he came from?

A. That's right.

Q. And you didn't turn around after that?

A. No.

Q. Now, after you got past him, how long after you were past him did you hear the first shot?

A. I heard the first shot before I got away. I hadn't even [fol. 94] left from there. When I run—

Q. The shot was fired before you went past Ted or before he passed you, is that correct?

A. He had went past me and I heard a shot. It is a small place and I couldn't get by Ted until he come—give me room to get by. When he come by, it was all over.

Q. You mean that he stepped aside to let you by?

A. No. Well, there is an icebox there.

Q. Yes.

A. And a garbage can there. I got over to the garbage, then he went past me.

Q. So you got out of his way?

A. Yes.

Q. When he went over the counter, that is the first time you saw him?

A. Yes.

Q. Did he jump over the counter?

A. He jumped over the counter.

Q. By putting his hands on the counter and jumping over?

A. Yes, one hand on the counter and he jumped over.

Q. He sort of flipped over the counter, is that correct?
[fol. 95] A. Yes.

Q. And how wide is that counter?

A. Oh, I guess it is about a foot wide, a foot.

Q. A distance of a foot?

A. Yes, just wide enough to serve barbecue. We serve orders mostly to take out.

Q. About as wide as that bench?

A. Yes.

Mr. Carey: About sixteen inches or so, Mr. Conley?

Mr. Conley: Yes.

By Mr. Carey:

Q. Now, did he run after he got behind the counter?

A. Yes, he was running when he—

Q. He was running?

A. He rushed up towards front.

Q. Did you ever hear Ted say anything from the time of this incident which is the 28th of February until today?

A. No, I haven't.

Q. In other words, he has never said anything that you have ever heard?

A. No.

Q. But before that, you had heard him talk, hadn't you?
[fol. 96] A. Yes, I had.

Q. When you saw him at the station, did he look the same as he looked when you saw him at the barbecue pit?

A. Did he look the same? He wasn't dressed the same, if that is what you mean.

Q. No, I mean appearance. I am talking about his face. Did he look the same?

A. He did to me.

Q. How long were you in the basement, Neddie? Is that the correct pronunciation, Neddie?

A. Yes.

Q. Before you came out?

A. Well, I stayed down there until the officers got there.

Q. And about how long would that be?

A. About thirty minutes, I imagine, because they stayed—

Q. Where was Jimmy at this time?

A. I think he was in the basement too. I am not for sure who was there because it was dark down there, because nobody wouldn't turn no lights on.

Q. When did you see him there?

A. Jimmy?

[fol. 97] Q. Yes.

A. When they come down to get us to take us over to the police station.

Q. All right. That's Jimmy Hackman?

A. Yes.

Mr. Carey: All right, no further questions.

Redirect examination.

By Mr. Conley:

Q. Now, on this incident that Mr. Carey asked you about where Mr. Ward and Ted and Flossie were involved, how long before the shooting was that?

A. That wasn't the same night. That was, oh, it must have been a week before that.

Q. And did you or did you not know that Flossie was married to this Mr. Ward?

A. No, I had never saw the fellow before that week. The first time I had ever seen him.

Mr. Conley: I have no further questions.

Recross examination.

By Mr. Carey:

Q. Neddie, this incident with the unknown man,—

A. Yes.

Q. —do you know which one I am talking about?

A. Yes.

[fol. 98] Q. Where were you going when you left there?

A. I was going home.

Q. Did anyone ask you to call anybody?

A. Yes.

Q. Who was that?

A. Ted asked me to make a call.

Q. What did he ask you to do?

A. He asked me to call the officers, the police.

Q. You mean the police?

A. Yes.

The Court: Who told you that?

The Witness: Ted.

The Court: What incident are you speaking of?

Mr. Carey: I am talking now about the week before.

Q. That is what you have in mind, is that right, Neddie?

A. Is that what you are asking about? That is what I am telling you about.

Q. About a week before?

A. Yes.

Q. How long were you there in matter of minutes with Ted and Flossie and this unknown man, the man whose name you do not know?

A. Oh, I will say about five minutes, because we was [fol. 99] getting off from work and I was waiting on a cab to come by. I didn't call one, just one passing by.

Q. Do you know why Ted wanted you to call the police?

A. As I say, they were having some words.

Q. Ted and this other man?

A. And Flossie.

Q. What were they saying?

A. What were they saying?

Q. Yes.

A. Well, Ted wanted Miss Ward to go with him and this other fellow wanted her to go with him, and that was just about it.

Q. And there were no blows struck at that time that you saw?

A. I didn't see no blows.

Q. Now, this night, I am still talking about with this unknown man, you left the barbecue place with Flossie and Ted on that night, is that right?

A. No.

Q. Who did you leave with?

A. I left for a cab.

Q. I mean when you left out of the place?

[fol. 100] A. We all come out together.

Q. When you say "we", who do you mean?

A. Me, Flossie and I don't know this other fellow's name, but there was another fellow that was working down there at the barbecue place.

Q. You came out?

A. Yes.

Q. Now, this man whose name we do not know at the present time, he joined you later, is that correct?

A. That's right. He was out on the street when we got there, I guess.

Q. Now, you and Flossie and Ted had agreed to go home together, is that correct, when you left?

A. Yes. Ted was going to drop me off at home.

Q. So as far as you know, this man was unexpected there, is that correct?

A. Yes.

Mr. Conley: Objection, your Honor.

The Court: Sustained.

Mr. Carey: There will be no further questions.

Mr. Conley: You may step down.

(Witness excused.)

Mr. Conley: Call Jimmy Hackman, please.

[fol. 101] The Court: Were you sworn, sir, this morning?

The Witness: Yes.

The Court: Be seated.

JIM PAUL HACKMAN, a witness called on behalf of the People, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Conley:

Q. What is your name, sir?

A. Jim Paul Hackman.

The Court: Hackett?

The Witness: Hackman.

By Mr. Conley:

Q. How do you spell your last name?

A. H-a-c-k-m-a-n.

Q. And where do you live, Mr. Hackman?

A. 6120 Greenwood.

Q. Now, would you please speak more slowly and a little bit louder. Now, where are you employed, Mr. Hackman?

A. 1035 East 63rd.

Q. In what capacity are you employed there?

A. At the barbecue house.

[fol. 102] Q. At the barbecue house, and what particular duties do you perform there?

A. Cook.

Q. And for how long have you been employed there?

A. Four years.

Q. What is the address there?

A. 1035 East 63rd.

Q. 1035, and you have been employed there how long?

A. Four years.

Q. Now, did you know the deceased in this cause, Flossie Ward?

A. Yes, I did.

Q. Now, prior to February 28th, 1959, how long did you know her?

A. Oh, I had been knowing her about four months.

Q. About four months, and how did you happen to know her?

A. During the time that—working on the job, she was employed.

Q. And she worked at the same place?

A. That's right.

Q. And did you know her before she came to work there?

[fol. 103] A. No, I didn't.

Q. Now, what were her duties there?

A. Waitress.

Q. Waitress. What shift did she work?

A. Four to—eight to five.

Q. About eight p.m. to five a.m.?

A. Eight p.m. to five a.m.

Q. Anyway, that would be the night shift?

A. Right.

Q. Do you know the defendant in this cause, Ted Robinson?

A. Yes, I did.

Q. And for how long prior to February 28, 1959, did you know him?

A. About the last part of December.

Q. Will you please keep your voice up, Mr. Hackman. Since the latter part of December?

A. That's right.

Q. That would be about two months?

A. About—

Q. Two or three months? How many months?

A. About two months.

Q. Where was the first place you ever saw him?

A. At the barbecue house.

[fol. 104] Q. Did you ever see him any other place but the barbecue house?

A. Before then, no.

Q. You mean from the latter part of December until February 28th, you saw him only at the barbecue house, is that right?

A. Right.

Q. And about how often did he come to the barbecue house during that period of time?

A. About three or four times a week.

Q. At about what time of the day or night would he come?

A. Well, I will say about 10:00 p.m.

Q. He came about 10:00 p.m.?

A. Yes.

Q. And how about in the morning?

A. Oh, around 5:00.

Q. Whom would he leave with, if anybody?

A. Flossie Ward.

Q. And prior to February 28, 1959, when was the last time you saw him?

A. Before the 28th?

Q. Yes, about how long?

A. Well, I seen him about the 27th.

[fol. 105] Q. About the 27th, that would be about the day before or so?

A. Yes.

Q. Now, will you please describe, Mr. Hackman, the physical appearance of this restaurant, the size and the placement of the furniture and so forth?

A. Well, it is a small place, and as you come into the door, there is two eating tables.

Q. Pardon me. By "small", about what dimensions would you say? From the street first to the back, about how many feet would you say it is; just an estimate to the best of your ability?

A. Oh, maybe about twenty feet, I imagine.

Q. Would that be from you to me or less or more?

A. A little longer, a little further than that.

Q. I am sorry, I can't hear you.

A. A little bit further than that.

Q. About this far?

A. About that.

Q. Indicating about 30 feet.

A. Somewhere like that, I guess.

Q. And how wide was the place?

A. It is about as wide as this place here. (indicating)

[fol. 106] The Court: Indicating for the record how wide?

By Mr. Conley:

Q. About twenty feet?

A. Yes.

Q. Would you answer the question so that the reporter can write it down? As you walk into the place, how was the furniture situated?

A. There are two tables.

Q. Are the tables to the right or to the left?

A. To the right.

Q. And is there a counter?

A. Yes, there is.

Q. Will you please describe the counter?

A. Well, the counter is on the left-hand side as you walk into the door.

Q. What shape is it in?

A. Well, it is—just as you walk in the door, there is the deep fry is setting there and the grill as you walk in the door, and we have a partition between the fryer and the table.

Q. Now, the counter itself, in what shape is it in, an "L" shape or semi-circle?

A. A circle, in a circle, I will say.

Q. And the longest portion is which one, the one in the back or the one along the side?

[fol. 107] A. The back.

Q. Did you have occasion to see Ted Robinson on February 28th, 1959, at about 10:30 p. m.?

A. That's right.

Q. Where were you?

A. I was at work fixing orders during that time.

Q. Where were you in the place?

A. I was in the front of the place.

Q. And did you see him come in?

A. Yes, I did.

Q. Did you recognize him when he came in?

A. Yes, I did.

Q. What did he do?

A. Well, he came in there. He stopped at the front of the counter and he leaves the front of the counter and goes to the back of the counter and jumps over and comes behind the counter and begins to shoot.

Q. Now, did he walk past where you were or did he stop before he reached where you were behind the counter?

A. No, he walked past me.

Q. And then he jumped over the counter?

A. Well, he jumped over the counter when he walked past me.

[fol. 108] Q. Now, I will show you what I will ask to have marked People's Exhibit 1 for identification.

(Thereupon said item was marked People's Exhibit No. 1 for identification.)

Which is a gun apparently .25 caliber automatic pistol, and I will ask you if you have ever seen that before or any gun like it before?

A. Yes, I have.

Q. When was the last time?

A. When Theodore Robinson entered the restaurant.

Q. Will you describe what if anything Theodore had in his hand when he entered the restaurant?

A. Well, he had the gun in his hand.

Q. And did you see a gun in his hand?

A. I can see, as a matter of fact, as I can see of it now. (indicating)

Q. And you are indicating about half of the gun?

A. That's right.

Q. Do you recall which hand he had the gun in?

A. No.

Q. But you do recall seeing the gun in his hand?

A. That's right.

Q. What happened after he jumped over the counter?

[fol. 109] A. Well, he started to the front of the restaurant and he began to start shooting.

Q. Did you see him shooting?

A. Yes.

Q. Did you see which direction he was shooting?

A. Yes; I did.

Q. Which direction was he shooting?

A. He was shooting—

Mr. Carey: Objection.

The Court: What is the objection?

Mr. Carey: Did you see him shooting? Ask him which direction the gun was pointed. I understand there were two shots fired. It might have occurred at different times.

The Court: Ask him that. Which way the gun was pointed the first shot.

Mr. Conley: I will withdraw the first question.

The Court: All right, very well.

By Mr. Conley:

Q. At that time, Mr. Hackman, you say that the defendant Robinson was farther in the restaurant than the point you were in, is that right?

A. That's right.

Q. And after he jumped over the counter, where was [fol. 110] Flossie Ward with regard to him?

A. Well, she was at the front of the restaurant.

Q. Was she standing still or was she moving?

A. She was fixing an order.

Q. I am sorry, I can't hear you.

A. She was working on an order.

Q. I mean when you saw her after Robinson jumped over the counter, was she standing still or was she moving?

A. No, she was moving.

Q. Which direction was she going in?

A. Well, she was moving away from him, getting out of the way of him.

Mr. Carey: Objection to the conclusion.

The Court: Getting away from him, strike that out.

By Mr. Conley:

Q. Was she moving toward the door or away from the door?

A. Towards the door, that's right.

Q. And when you saw the defendant fire the gun, was the gun pointed towards the door or away from the door?

A. It was pointed towards the door.

Q. Was it pointed towards Flossie Ward?

[fol. 111] A. That's right.

Q. And how many shots did you hear?

A. I heard two shots.

Q. What did you see or hear after that?

A. Well, then I went into the back to get out of his way.

Mr. Carey: Objection.

The Court: I went in the back may stand. The rest is stricken.

By Mr. Conley:

Q. And did you see either one of them go out of the door?

A. No, I didn't.

Q. By the way, can you tell us how Robinson was dressed at that time?

A. Well, he had on a—I will say a blue coat and a brown hat and a—I didn't notice the pants.

Q. And did you have occasion to see him after that, after the 28th?

A. Yes, I did.

Q. Where was that?

A. In the 7th District station in the lineup.

Q. And can you tell us how many men were in the lineup?

A. There was five fellows in the lineup.

[fol. 112] Q. And what did you say or do?

A. I identified Theodore Robinson.

Q. What did you say?

A. I said, "He is the man that did the shooting."

Q. And how far were you from him when you said that?

A. Well, I was close enough—I touched him with my hand.

Q. What did he say when you said, "This is the man that did the shooting"?

A. He didn't say anything.

Mr. Conley: Your witness.

Cross examination.

By Mr. Carey:

Q. Mr. Hackman, is it?

A. That's right.

Q. How old are you?

A. 28.

Q. Now, did I understand you to say that you knew Flossie Ward for about four months prior to February 28th, is that correct?

A. That's right, that's right.

Q. And she had worked for this employer for how long, if you know?

[fol. 113] A. Well, during the time that she had been there, four months.

Q. And had she ever worked there before those four months?

A. Yes, she had.

Q. And how long ago was that?

A. Well, I wasn't there during the time.

Q. It was just what you have heard, is that correct?

A. That's right.

Q. But you have been there for about four years?

A. That's right.

Q. And you have known Ted then for about two months prior to this incident?

A. Yes. That's right.

Q. Now, this counter that you talk about in the barbecue, it's like an "L", is that correct?

A. Yes, I would say so.

Q. And is one end of the "L" attached to the wall on the side?

A. Yes, it is.

Q. And is the other part of the "L" attached to the wall in the front?

A. That's right.

[fol. 114] Q. Now, the tables that the people sit at, how are they served?

A. Well, they—it is on the right-hand side at the wall.

Q. Do they come up and get the food?

A. No, we carry food to them.

Q. And how do the people get—waitresses themselves get the food to them?

A. Well, we have a gate at the end of the counter.

Q. At which end?

A. At the rear end of the counter.

Q. Now, as I understand it, the place you worked at the preparation, that is in the front, is that correct?

A. That's right.

Q. And how far is the cooking area from the counter?

A. From the counter?

Q. Yes.

A. Well, I will say it's about three or four feet.

Q. And then you have about a three foot passage in there, is that correct?

A. That is correct.

Q. And the girls come to you and get the orders and also [fol. 115] prepare some other things, is that right?

A. Yes, sir.

Q. Now, did you see Robinson come in?

A. Yes, I did.

Q. Now, when he came in, was Flossie near you?

A. Yes, she was.

Q. Was she between you and Ted?

A. During the time he came in?

Q. When he came in?

A. Yes, she was.

Q. She was closer to the front then, is that correct?

A. That's correct.

Q. How close was she to Ted when he came in the door, in feet?

A. About five feet.

Q. And separating them was the counter, is that correct?

A. That's right.

Q. Did she turn around and look at him?

A. Yes, she did.

Q. Did she say anything?

A. Yes, she did.

Q. What did she say?

[fol. 116] A. She said, "Ted, don't start anything."

Q. She said that as soon as he came in, is that correct?

A. That's right.

Q. And then she goes back to what she was doing?

A. Well, during the time—yes.

Q. Just answer that question.

A. Yes.

Q. She did, and she was preparing something. She looked and said this to Ted and she went back to what she was doing?

A. Yes.

Q. Did he stop?

A. Yes, he did.

Q. How long did he stay stopped?

A. Oh, I will say about a minute.

Q. What did he do when he was stopped?

A. He stood in the front of the counter and we have a glass counter. He had his arm up on the glass with the gun in his hand.

Q. For about a minute?

A. Yes.

Q. How close was Flossie to him at that time?

A. Oh, about six feet, I reckon.

[fol. 117] Q. From him, and how close was she from his arm?

A. From his arm? Oh, maybe about five feet.

Q. And did she look at him?

A. No, she didn't during the time, no.

Q. Did you look at him?

A. Yes, I did.

Q. And that's when—did you leave them?

A. No, I didn't.

Q. Did you notice anything unusual about him?

A. No.

Q. Now, he then left after standing there with the gun pointed at her for about a minute, you would say, is that correct?

A. That's right.

Q. He then left and went towards the other part of the counter, is that correct?

A. That's right.

Q. Would that be in a diagonal?

A. No, that's from the front—that is straight there.

Q. Straight?

A. That's right.

Q. And then he passed behind her, is that correct?

A. That's right.

[fol. 118] Q. And how close was the closest he had ever gone to her?

A. Well, that I wouldn't know.

Q. Well, as he was standing at the counter, she was five feet away, is that correct?

A. That's right.

Q. From his hand?

A. Yes.

Q. And as he walked, he would get closer to her, is that right?

A. No, going toward the other end of the counter, he would be going away.

Q. Walked away?

A. Yes.

Q. He went to the other end of the counter, and how far was he away from her when he was at the furthest point that way from her? Do you understand what I mean by that?

A. Well, I will say about twenty feet.

Q. Twenty feet away?

A. Yes.

Q. Did she look at him at that time?

A. No, she didn't.

Q. Did he say anything?

[fol. 119] A. No, he didn't.

Q. In fact, he never said anything, is that correct?

A. That's right.

Q. Now, Neddie—is that her name, Neddie?

A. Yes.

Q. Is she sometimes called Sally?

A. That's right.

Q. Now, Sally was also behind the counter?

A. That's right.

Q. She was on the other side also, is that correct?

A. That's right.

Q. Am I correct in saying then that Flossie was closest to the front?

A. Yes, she was.

Q. You were next closest?

A. That's right.

Q. How far were you away from her?

A. Well, we were side by side.

Q. A foot or less?

A. Less than a foot.

Q. And then on the other side was Sally?

A. That's right.

[fol. 120] Q. And how close was she to you?

A. Oh, about a foot.

Q. So you were really bunched up there, is that right?

A. Yes.

Q. No other employees?

A. Not in the front, no.

Q. Now, were there any customers there?

A. Yes, there was.

Q. And do you know any of them?

A. Well—

Q. Answer yes or no?

A. No.

Q. And have you seen them since?

A. No, I haven't.

Q. Had you seen them before this night?

A. That I wouldn't know.

Q. How many people were there altogether?

A. Well, maybe about ten, I would say.

Q. Customers besides employees?

A. That's right.

Q. Were there any of them sitting at the counter?

A. Yes, there was.

Q. How many?

[fol. 121] A. Well, about six.

Q. Were any of them sitting at the counter that Ted passed? In other words, did he pass any of the people sitting at the counter when he walked from the front to the rear?

A. Yes.

Q. And how many would you say he passed?

A. He passed about six.

Q. And that is when he had a gun, is that correct?

A. That's right.

Q. Now, he walked up to the counter or did he run or how did he go?

A. He was in a hurry. He didn't run. He was just walking fast.

Q. When he got to the counter, did he stop momentarily?

A. No, he just jumped over the counter.

Q. He flipped it with the hand and jumped over?

A. No, he just jumped over to my knowing.

Q. Did you watch him all this time?

A. No, I didn't.

Q. Now, you saw him with the gun?

A. That's right.

Q. But you didn't watch him?

[fol. 122] A. No.

Q. When he got over the counter, he was then the furthest one to the back or the closest to the back?

A. He was closest to the back.

Q. Sally was next?

A. That's right.

Q. And then came yourself?

A. Yes.

Q. And then Flossie, is that right?

A. That's right.

Q. So there were then two people between Ted and Flossie, is that correct?

A. That's correct.

Q. And it was a three foot passageway, is that correct?

A. That's right.

Q. Now, Sally passed him, is that correct?

A. That I wouldn't know.

Q. Were you watching?

A. No, I wasn't.

Q. Or don't you remember?

A. I don't remember that.

Q. Now, were you in between Ted and Flossie when the [fol. 123] first shot was fired?

A. Yes, I was.

Q. Were you facing him?

A. Yes, I was.

Q. And were you turned facing him like I am facing you, indicating a full view of me?

A. Yes, I was. I was on my way by him.

Q. And where was she?

A. She was on her way out.

Q. I am talking about Flossie.

A. On her way out the door.

Q. She was already over the counter?

A. No, she wasn't. She was coming to the counter to go out.

Q. She was still behind it?

A. That's right.

Q. Did she say anything at that time?

A. No.

Q. And he said nothing?

A. No.

Q. Did he walk by you?

A. That's right.

Q. Did he look at you?

A. No, that I wouldn't know.

[fol. 124] Q. Were you looking at him?

A. I was looking as I was going.

Q. In other words, you didn't pay any attention?

The Court: Just a moment. This is not a place of amusement, young man. If you want to laugh, get out of here. This is serious business.

Go ahead.

By Mr. Carey:

Q. In other words, you didn't pay any attention to him?

A. That's right.

Q. You didn't?

A. No, I didn't.

Q. The shots were fired while he was in the passageway, between where you were, between him and Flossie?

A. When the first shot was fired, that's right.

Q. The first one?

A. Yes.

Q. And where was he when the second shot was fired?

A. He was still behind the counter.

Q. And where was Flossie?

A. She was on her way out.

Q. How close was she to him when the first shot was fired?

A. Well, I will say about three or four feet.

[fol. 125] Q. Three or four feet?

A. That's right.

Q. How close was she to him when the second shot was fired?

A. Oh, she was about five feet.

Q. Now, did you pass him before he jumped the counter?

A. No.

Q. In other words, he jumped the counter and left, is that correct?

A. That's right.

Q. That is the last time you saw him until you saw him at the police station the following night?

A. That's right.

Q. And he looked the same at the police station as he did when he was in the restaurant, is that correct?

A. Yes, he did.

Q. I am talking about his expressions?

A. Yes, he did.

Q. And did you—how long were you with him in the police station in his presence?

A. For about an hour.

Q. An hour? Did he say anything while he was there?
[fol. 126] A. No, not to me, no.

Q. Did Ted look the same to you on this evening? I am talking about the 28th as he had looked every time you had seen him for the past two months?

A. Yes, he did.

Q. No expression? Was there any expression on his face?

A. No.

Q. And he walked all right?

A. Yes, to me he did.

Q. As I understand it, he just walked in the door, pointed the gun at Flossie. She said something to him while he had the gun, is that correct?

A. That's right.

Q. He leaned his hand on the glass counter about three feet away from Flossie?

A. About five feet.

Q. Oh, excuse me, about five feet. She wasn't facing him at the time?

A. No.

Q. He then walked twenty feet to the back and away from her, is that correct?

A. That's correct.

Q. He jumped the counter and came back in the passage- [fol. 127] way, is that correct?

A. That's correct.

Q. And he stood there about a minute, you said, before he went to the back. Can you tell me about how long he was in the store before the first shot was fired?

A. I will say about two minutes.

Q. So about a minute after the first shot was fired, and you didn't see him leave nor did you see Flossie leave?

A. No, I didn't.

Q. Thank you. Oh, one other; you identified People's Exhibit 1 for identification, is that correct, similar to the one that you saw in Ted's hand?

A. That's right.

Q. Now, is that what you saw or can you tell me what you saw?

A. Well, he had it about something like this (indicating), I will say, and I can see this part here.

Q. Then you saw then the barrel, about two inches of the barrel, is that right?

A. That's right.

Q. The tip, and you couldn't see any of the handle, and [fol. 128] just a portion of the trigger shell, is that correct?

A. That's right.

Q. And is that the most you saw at any time?

A. During the time, yes.

Q. Yes, that's all you saw. Do you know if any of the pellets that were fired in the store were ever recovered?

A. Well, the hull, yes, I know one was.

Q. One of the bullets fired in the restaurant was recovered, is that correct?

A. The shell part was.

Q. The casing?

A. The casing.

Q. But the pellet part, do you know about that?

A. No.

Q. But the police were there, is that correct?

A. That's right.

The Court: That concludes the cross examination?

Mr. Carey: Yes. Excuse me.

The Court: Any redirect?

Mr. Carey: I'm sorry.

The Court: All right, sir.

Mr. Conley: Anything further, Mr. Carey?

[fol. 129] Mr. Carey: No.

Redirect examination.

By Mr. Conley:

Q. Now, when this Robinson walked in, did he appear to you to be drinking or sober?

A. He seemed to be sober to me.

Q. And did you see the shell casing that was recovered by the police?

A. Yes, I did.

Q. And I will show you what I will ask to have marked People's Exhibit 2 for identification.

(Thereupon said item was marked People's Exhibit No. 2 for identification.)

Which is a small white box containing one shell casing, and I will ask you if that shell casing looks like the one

that was recovered by the police? Would you examine it, please?

A. Yes, it looks like the one.

Q. And how was Robinson dressed on that occasion?

Mr. Carey: Asked and answered, Judge.

The Court: Yes, he said he had on a blue coat and a brown hat.

Mr. Conley: I will withdraw the question.

[fol. 130] The Court: Very well.

Mr. Conley: I forgot that I had asked him. I have no further questions.

The Court: Any re-cross?

Mr. Carey: No, Judge.

(Witness excused.)

The Court: We will take a ten minute recess.

Mr. Carey: Judge, we have a witness and we have had great difficulty in getting her and she is here and she is ill and I was wondering if the State's Attorney would be kind enough to tell me when he will conclude his case and if we can't conclude today, maybe we can excuse her and bring her back tomorrow and we will put her on as our first witness.

Mr. Conley: I don't know if we can conclude our case today, but whatever would be convenient to the witness.

The Court: Where is she?

Mr. Carey: She is here.

The Court: Have her come up.

Mr. McDermid: I would like to talk to her a few minutes. I will get that arranged while you are recessed.

[fol. 131] The Court: Bring her up so I can tell her she has to come back tomorrow morning. All right, take a ten minute recess.

(Recess taken.)

Mr. Carey: Judge, before you bring out the prisoner, this is Mrs. Calhoun.

The Court: You can bring him out.

Mr. Carey: We will get to her tomorrow.

The Court: Bring him out. Mrs. Calhoun, I understand you are ill?

Mrs. Calhoun: Yes, I am.

The Court: I am going to excuse you now. You be back here tomorrow morning at 10:30. Do you think you will be able to put her on?

Mr. Carey: She will be our first witness as soon as the State concludes.

The Court: How many more witnesses do you have?

Mr. Conley: We have three witnesses we expect to put on this afternoon, and we have two witnesses tomorrow.

The Court: Then better not have her get here until—are they long?

Mr. Conley: The doctor and the ballistics expert.

The Court: Probably will take some time.

[fol. 132] Mr. Carey: No.

The Court: What time do you want her?

Mr. Carey: 11:30.

The Court: You be here at 11:30 and we will put you on the stand. You may go home.

All right, bring in the defendant.

CLARENCE STARR, a witness called on behalf of the People, having been duly sworn, was examined and testified as follows:

The Court: Have you been sworn, sir?

The Witness: Yes, I was.

The Court: Be seated, please.

Direct examination.

By Mr. Conley:

Q. What is your name, please?

A. Clarence Starr.

Q. How do you spell your last name?

A. S-t-a-r-r.

Q. What is your business or occupation?

A. Chicago policeman, 22nd District.

Q. You are assigned to the 22nd District?

A. I am, sir.

[fol. 133] Q. Will you please keep your voice up?

A. All right, sir.

Q. We seem to have some interference out there. Did you have occasion to arrest the defendant in this cause, Theodore Robinson?

A. Yes, I did.

Q. Who participated in this arrest with you?

A. Officer Kerfman and Officer Siersten. Officer Kerfman.

Q. That is K-e-r-f-m-a-n, is that right?

A. And another officer.

Q. And another officer?

A. That's right. I don't recall his name.

Q. Where did you arrest him?

A. At 141 North Wolcott.

Q. By the way, where did you live?

A. I live—I did at that time 141 North Wolcott.

Q. On February 28, you lived at 141 North Wolcott?

A. I did.

Q. How did you happen to arrest him?

A. Well, on March 1 in the late afternoon, Robert Moore came to my apartment and he told me that a preacher and a lady had been killed.

Mr. Carey: Objection.

[fol. 134] The Court: Sustained. You can't tell us what they told you.

Mr. Carey: Judge, I think in this case I am going to withdraw my objection. I would like to hear what he said.

The Court: Very well, objection withdrawn.

Mr. Carey: I am sorry.

The Court: That is all right.

By Mr. Conley:

Q. Tell us what the conversation was?

A. Robert Moore came to my apartment and he told me that a preacher and a lady had been killed on the south side,

namely Flossie Ward and Reverend Elmer Clemons, and he said, "The supposed killer is now up in my house", he said. He said he just had a call from Robert Moore's mother stating that Mr. Robinson's mother had called his mother and told her about it, and then she called him. And he said, "I am afraid for him to be in my house and I would like for you to go up and arrest him." So I called for assistance.

Q. Now, by the way, where did this Robert Moore live?

A. Apartment 1307, 141 North Wolcott.

Q. What did you do then after this conversation with [fol. 135] Robert Moore?

A. Well, I called for assistance and Officer Kerfman and the other officer, they responded and I met them on the first floor of the building so we went up to Robert Moore's apartment at 1307. So I knocked and I went in and I looked around and I didn't see anyone so I asked where was the fellow named Ted, and she said, "He just stepped out the door." I said, "What kind of clothes does he have on; a white shirt?" She said, "He has got—"

Mr. Carey: Objection as to this.

The Court: Sustained.

By Mr. Conley:

Q. What did you do then after this conversation?

A. We went out into the hallway and we saw the man that we thought was Ted.

Q. And would you describe the man you saw in the hallway?

A. Well, he had on a white shirt and brown leather jacket, no hat, and he was about—I guess he was around five feet, six, seven, dark brown complexion with a mustache.

Q. And do you see that man in court today that you saw in the hallway at 141 North Wolcott?

[fol. 136] A. I do.

Q. And that is the defendant Robinson, is that right?

A. Yes, it is.

Q. Did you have any conversation with him at that time?

A. Yes, I did.

Q. And who was present?

A. The two officers and Robinson and myself.

Q. What if anything was said at that time and place?

A. I asked him what his name was and he said, "My name is 'Ted.'" I said, "What is your real name?" And he said, "Theodore Robinson." Then I asked him—I told him he was under arrest and he said, "For what?" I said, "Well, you are supposed to be wanted for killing two people on the south side." I asked him did he know anything about it. He said, "No, I don't know what you are talking about." So then I asked him where he lived and he said, "I don't live no place."

I said, "What do you mean you don't live no place?" He said, "That's what I said."

So then pretty soon asked him again and he said, "Some-[fol. 137] times I stay with my mother." And I said, "Where does she live?" He said, "Some address on East 44th Street."

So then we took him on to the 27th District and while we were making the arrest slip, asked him again his address and he said he lived at 7320 South Parkway. That's about all he said. He didn't know anything about any killing or anything.

Q. Now, I will show you what I will ask to have marked People's Exhibit 3 for identification which is a navy blue regular length overcoat.

(Thereupon said item was marked People's Exhibit No. 3 for identification.)

And I will ask you if you have seen that overcoat before?

A. This one? Yes, I did.

Q. And where and when did you see it?

A. I saw it shortly after, I imagine about an hour or an hour and a half after we had arrested Ted.

Q. And where did you see it?

A. We got it from the apartment.

[fol. 138] Mr. Carey: Objection.

The Witness: Where did I see it?

Mr. Conley: Just wait.

The Court: You may state where you saw it.

The Witness: I saw it in Robert Moore's apartment in the closet.

By Mr. Conley:

Q. And who was present in the room when you saw the coat?

A. Well, Robert Moore's wife, Robert Moore, and Officer Creed.

Q. And did you have a conversation with Robert Moore with regard to the coat?

A. Yes, we did.

Q. Now, I will show you what I will ask to have marked People's Exhibit 4 for identification.

(Thereupon said item was marked People's Exhibit No. 4 for identification.)

And ask you if you have seen that before?

A. The hat?

Q. Yes, the hat?

A. Yes, I did.

Q. It is a brown hat, felt. Where did you first see that?
[fol. 139] A. I saw it in Robert Moore's apartment in the closet.

Q. When?

A. About an hour and a half after Theodore's arrest.

Q. Would that be approximately the same time you saw the coat?

A. It was at the same time.

Q. And what if anything unusual did you find about the coat?

A. Well, we found a .25 Colt automatic wrapped in a white handkerchief on the inside pocket of the topcoat.

Q. Would that be an automatic pistol?

A. Yes, it was a Colt pistol, that's right.

Q. And what did you do with the coat and the hat and pistol after you found them in Robert Moore's apartment?

A. We took them back out into the car where Ted was and we asked him.

Q. Who else was there besides Ted?

A. Officer Williams, Officer Creed and myself.

Q. Now, I will show you what I have asked to be marked People's Exhibit 1 for identification and ask you if you [fol. 140] have seen that before?

A. Yes, I have.

Q. Where did you see it?

A. I first saw it when we took it out of his coat pocket here.

Mr. Carey: Objection as to "His", Judge.

The Court: Sustained. First of all, you took it out of the coat pocket?

The Witness: That's right.

By Mr. Conley:

Q. You took it from the pocket of the coat which is People's Exhibit 3 for identification, is that right?

A. That's right.

Q. Now, did you have a conversation with Theodore Robinson with regard to this coat which is People's Exhibit 3 for identification and with regard to this automatic pistol which is People's Exhibit 1 for identification?

A. Yes, I did.

Q. Where?

A. Out in the car in front of 141 North Wolcott.

Q. And what date was that now?

A. March 1 of this year.

Q. About what time?

[fol. 141] A. It was around seven o'clock, seven p. m., I imagine.

Q. And who was present?

A. Officer Creed, Officer Williams, Theodore Robinson and myself.

Q. And what if anything was said at that time with regard to the coat and with regard to the automatic pistol?

A. We asked Mr. Robinson if these were his clothes and he said, "Yes." And I asked him if that was his pistol and he said, "No". He said someone must have put it in his pocket. He didn't know anything about it.

Q. Did you tell him it was found in his coat?

A. I did.

Q. And he told you that someone must have put it in there, is that right?

A. That's right.

Q. And what happened after that?

A. Well, we started out to the 7th District and on our way, we questioned him about the killings. He didn't admit anything.

Mr. Carey: Objection.

The Court: Strike it out.

[fol. 142] By Mr. Conley:

Q. Did you go to the 27th District or the 7th?

A. First we went to the 27th District and then we called the 7th District and asked them if Ted was wanted out there and they said yes, and then the two detectives came from the 7th District to the 27th District and we picked him up and we picked the clothes up and then we started to the 7th District.

Mr. Conley: Your witness.

Mr. Carey: No questions.

The Court: No cross examination. Call the next witness.

Mr. Conley: You may step down.

The Court: Step down, please.

Mr. Conley: May I ask one more question, Judge, or two?

The Court: Yes.

By Mr. Conley:

Q. What did you do with the coat and pistol? You brought them to the 7th District?

A. To the 7th District, that's right.

Q. To whom did you give them?

A. I gave them to Officer Breckenridge here.

Q. Breckenridge. That is the coat, the hat and the pistol, [fol. 143] is that right?

A. That's right.

Mr. Conley: I have no further questions.

The Court: Any cross?

Mr. Carey: No questions.

The Court: No cross. Call your next witness.

(Witness excused.)

LOUIS KERFMAN, a witness called on behalf of the People, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Conley:

Q. What is your name?

A. Officer Louis Kerfman, K-e-r-f-m-a-n.

Q. You are a police officer assigned to the 27th District, City of Chicago?

A. Yes, I am.

Q. Did you have occasion to participate in the arrest of Theodore Robinson?

A. I did.

Q. What date?

A. The 28th of February.

[fol. 144] Q. Would that be the 28th of February or the 1st of March?

A. It may have been the 1st of March.

Q. Well, do you recall where you arrested him?

A. 141 North Wolcott.

Q. How did you happen to go to 141 North Wolcott?

A. Well, we received a call to meet a police officer in the lobby of the building.

Q. And did you proceed to that address?

A. Yes, we did.

Q. What did you find when you got there?

A. Well, when we reached there, we found Officer Starr waiting in the lobby of the building.

Q. And did you have a conversation with Officer Starr?

A. We did.

Q. And what did you do after you had a conversation with Officer Starr?

A. We went up to the 13th floor.

Q. Tell us what happened, Officer?

A. Well, after Officer Starr related what he wanted us—of the police officers—

Mr. Carey: I am sorry. I can't hear you.

The Court: Little louder, please, Officer?

[fol. 145] The Witness: Yes, sir. After Officer Starr stated what he wanted the police officers for, we went up to the 13th floor and Officer Starr knocked at the door and the person come—came to the door and stated that there was some man that was on the premises that had committed a murder.

Mr. Carey: Objection, Judge, as to conversation.

The Court: Strike it out.

By Mr. Conley:

Q. What did you do after the conversation, Officer?

A. She stated that the man had left—

Mr. Carey: No.

The Court: No, you can't state it unless the defendant was there. Was he there?

The Witness: He was standing in the hallway.

The Court: How far away?

The Witness: Oh, maybe about twenty feet away or so.

The Court: Go ahead.

By Mr. Conley:

Q. What did you do after this conversation, Officer?

A. After the conversation, we seen the man in question. We placed him under arrest and took him into the 27th District.

[fol. 146] Q. Were you present when Officer Starr recovered the overcoat and the hat?

A. No, I wasn't.

Q. Where were you?

A. I resumed normal duty.

Q. And you had no conversation with the defendant or you were not present at a conversation with the defendant with regard to the coat and a gun?

A. No, I wasn't.

Cross examination.

By Mr. Carey:

Q. Officer Kerfman, you referred to 141 South Wolcott. Is that the project?

A. North Wolcott.

Q. Is that the project?

A. Yes, that's right.

Q. The means in getting to the 13th floor is by elevator?

A. Yes.

Q. Where is the apartment that you went to in reference to the elevator?

A. Oh, I would say—well, of course, it is right near the elevator. I will say approximately twenty-five, thirty feet from the elevator.

[fol. 147] Q. Do you have to make any turns in the corridor to get there or right in line? Do you understand what I mean by that?

A. I don't remember, counsel.

Q. Are there stairs there also?

A. I believe there is an exit.

Q. And do you know where the stairs are in reference to the elevator?

A. No, I don't.

Q. Do you know where the stairs are in reference to the apartment that you went into?

A. No, I don't.

Q. Now, I think you told us that the defendant—is that who you mean by Theodore Robinson?

A. Yes, sir.

Q. Indicating for the record the defendant.

You say you saw him about twenty feet away from the door, is that right?

A. No, sir, from the elevator.

Q. Twenty feet away from the elevator, and would that be further away from the door than of the apartment that you went to?

A. About the same distance.

Q. Well, how far was he away from the door of the apartment? [fol. 148] ment?

A. Approximately twenty feet.

Q. So it is twenty feet from the elevator and he was twenty feet from the door, is that right?

A. Something like that.

Q. What was he doing when you first saw him?

A. He was standing there.

Q. Anybody with him?

A. I don't recall.

Q. Is the corridor well lighted?

A. To my knowledge.

Q. And what time of the day or night was this?

A. It was in the latter part of the evening.

Q. Now, when was the first time that you saw him in the corridor?

A. Oh, when we came off the elevator.

Q. In other words, he was on the floor before you got there?

A. Yes.

Q. And were you dressed in uniform?

A. I was.

Q. As you are now?

A. Yes.

Q. And your partner that responded to the call with you, [fol. 149] his name is what?

A. Officer Elsoos. That is his last name.

Q. Was he in uniform?

A. E-l-s-o-o-s.

Q. Was he in uniform?

A. He was, sir.

Q. What about Starr?

A. Starr wasn't in uniform.

Q. Now, when you came up there, did you have anything in your hands?

A. No, sir.

Q. No guns or anything of that nature, is that correct?

A. Not at the time that we hit the floor, no.

Q. Now, before you got to the door, did you take out any guns?

A. Yes.

Q. Now, from where Theodore Robinson was and the door to the apartment, is there anything that obstructs the view?

A. To my knowledge, no.

Q. Is it then in a straight line as you were at Moore's—that is Moore's apartment, is that correct?

[fol. 150] A. Yes.

Q. When you were at Moore's apartment door, could you still see Theodore Robinson?

A. Yes.

Q. What did he do?

A. Just stood there.

Q. Looking at you?

A. No.

Q. Which direction was he facing?

A. I believe he had his back to us.

Q. Anything unusual about him, the way he was dressed?

A. Not to my knowledge, no.

Q. Now, did you talk to him at any time before you went to Moore's door?

A. No.

Q. Did he have to pass in front of you to go to the elevator or by you?

A. No.

Q. Did he have to pass near you or by you to go to the stairs?

A. I don't recall where the stairs were or located at.

Q. That's right. After you went to the apartment, did [fol. 151] you stay at the door of the apartment or did you go in?

A. No, we stood at the door.

Q. Now, did anybody go in the apartment?

A. As I recall, Officer Starr did.

Q. And you two stayed outside?

A. Yes, we did.

Q. You didn't talk to Robinson at that time?

A. No, we didn't.

Q. And he still stayed where he was?

A. Yes.

Q. How long did you spend at the apartment door, would you say?

A. Well, not very long.

Q. Well, to the best of your recollection, couple of minutes?

A. Possible.

Q. And then you walked towards Robinson?

A. As I remember, yes.

Q. Would that be in the same direction as towards the elevator?

A. It would be.

Q. Did you have to pass the elevator to go to Robinson?
[fol. 152] A. No.

Q. Now, when you came up to him, was he still facing away from you?

A. No, he turned around then, as I recall.

Q. And faced you?

A. Yes.

Q. And did he remain standing?

A. He did.

Q. And you went up to him, isn't that correct?

A. That's correct.

Mr. Carey: No further questions.

The Court: Re-direct?

Mr. Conley: No re-direct.

The Court: Call the next witness, please.

(Witness excused.)

Mr. Conley: Officer Breckenridge. You have been sworn, haven't you?

The Witness: I have.

[fol. 153] ROBERT BRECKENRIDGE, a witness called on behalf of the People, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Conley:

Q. What is your name, please?

A. Robert Breckenridge.

Q. How do you spell your last name?

A. B-r-e-c-k-e-n-r-i-d-g-e.

Q. What is your business or occupation?

A. Police officer.

Q. And what district are you assigned to?

A. The 7th District, Woodlawn.

Q. Were you so assigned on or about the 28th of February, 1959?

A. I was.

Q. Did you have occasion to investigate the death of Flossie Ward?

A. I did.

Q. And at what time?

A. This was about 10:30 p. m., February 28, 1959.

Q. Where if any place did you go?

[fol. 154] A. 1035 East 63rd Street.

Q. And would you describe what you saw and heard when you got there?

A. I saw two persons laying on the sidewalk upon my arrival. Two wagons were also there at this establishment.

Q. Of what sex were these persons?

A. One was male and one was female.

Q. And who if you know is the female person?

A. The female I learned was an employee of this establishment.

Q. The name?

A. Flossie May Ward.

Q. And what did you do then?

A. Told the wagon men—

Mr. Carey: Objection to conversation.

The Court: Sustained.

By Mr. Conley:

Q. Where were these persons taken, if you know?

A. They were taken to the Woodlawn Hospital.

Q. And did you have any conversation with anybody in the restaurant at that time before you went?

A. None other than learning the identification of the individuals that we had seen.

[fol. 155] Q. I am sorry, I didn't hear the last part of your answer.

A. None other than learning the identification of the individuals that we had seen.

Q. Did you learn the identity of the person who had done the shooting?

Mr. Carey: Objection. That would be just his conclusion.

The Court: Yes, sustained.

By Mr. Conley:

Q. And where did you go then, Officer?

A. You mean after leaving or going into the restaurant?

Q. First of all, what if anything did you find in the vicinity?

A. In the vicinity, we recovered one spent shell or casing.

Q. I will show you what I have asked to have marked People's Exhibit 2 for identification. It is a small white box containing a small shell casing, and I will ask you if you have seen that before?

A. Yes, I have seen that before.

Q. And where did you see it?

A. I saw this at the location of 1035 East 63rd Street.

[fol. 156] Q. And I will show you People's Exhibit 1 for identification which is a .25 caliber automatic pistol and I will ask you if you have seen that before?

A. I have.

Q. Where and when was the first time you saw that?

A. I saw it March 1, 1959, on the second floor of the Woodlawn police station at 6344 South Harper Avenue about 8:00 p. m., around that time.

Q. From whom did you receive it?

A. I received it from Officers Starr, Creed and Williams who gave it to me.

Q. Were you present at any time at a showup in which the defendant was?

A. I was.

Q. And do you recall what date that was?

A. That was the same date that I had just stated.

Q. And what date was that?

A. March 1, 1959.

Q. And what time of the day?

A. Oh, the showup must have been around—somewhere between 9:00 and 10:00 p. m. on that day.

Q. And where?

A. Second floor, 6344 South Harper, the Woodlawn [fol. 157] police station.

Q. And who was present?

A. There was Officer Starr, Officer Williams, Officer Wiley, Officer Childress, Lieutenant Noonan, and there was a Maxine Butler who had been notified to be there. There was Jimmy Hackman. There was Miss Neddie Batts, and possibly one or two others that I don't recall just now.

Q. And you heard the other witnesses testify that there were five men in the lineup, is that right?

A. Yes.

Q. And what if anything did anybody say or do at that time?

A. The witnesses that we had were asked to point out a man that is supposed to have been known to them as Ted.

Q. What happened?

A. The three witnesses pointed Ted out.

Q. What did they say? As I understand, Ted was there and could hear them.

Mr. Carey: Objection, Judge, unless it is in the presence of the defendant and I know he was there, but just how close he was to them, if he could hear—

[fol. 158] The Court: Show the distance.

By Mr. Conley:

Q. Was Ted in the lineup?

A. Yes, he was.

Q. How far away were these witnesses from Ted at the time they spoke?

A. As I recall, the two female witnesses were reluctant to get close to Ted.

Mr. Carey: Objection and move to strike it out.

The Court: Strike that out.

By Mr. Conley:

Q. About how many feet each one, if you can recall?

A. They were no more than from ten to fifteen feet away.

Q. And how far was Jimmy from the defendant?

A. Jimmy was the same distance at that time of the showup.

Q. And by the two female witnesses, whom do you mean?

A. Maxine Butler and Neddie Batts.

Q. And what did Neddie say?

A. She said that that was Ted, pointed him out.

Q. What did Maxine say?

A. Same thing.

Q. What did Jimmy say?

[fol. 159] A. Same.

Q. Now, at the time you got this gun which is People's Exhibit 1 for identification, did it have the clip in there?

A. Yes, it did, when I received it.

Q. I am removing the clip now. Was the clip loaded or unloaded and if loaded, how many shells were in it?

A. As I recall, there was one live shell in the gun.

Q. I will ask you if you have ever seen what I will ask to be marked People's Exhibit 5 for identification before?

(Thereupon the said document was marked People's Exhibit No. 5 for identification.)

This would be a green envelope approximately seven inches by three and a half inches.

A. Yes, I have seen it before.

Q. And where did you first see it?

A. In the Woodlawn police station about noon on the 1st of March, 1959.

Q. And this is marked "Coroner's Bullet File", "Bullet Envelope".

[fol. 160] A. Yes, it is.

Q. With "Flossie Mae Ward", "Dr. George Goldenberg, Coroner's Physician", is that right?

A. Yes.

Q. I will show you these initials appearing on the lower right-hand corner and I will ask you if you know whose signature is on that?

A. Those initials are mine.

Q. Who put them on there?

A. I placed them on there.

Q. When?

A. On the date on the envelope, March 1, 1959, at the time I received the envelope.

Q. And was this envelope sealed or unsealed when you received it?

A. It was sealed at the time I received it.

Q. What if anything was in it, if you know?

A. I didn't open the envelope. I initialed it.

Q. Did you feel it?

A. I could feel some hard object in it.

Q. What did you do with the envelope then after you received it?

A. Later I took the envelope to the Police Crime Laboratory at 1121 South State Street.

[fol. 161] Q. And you left it there, is that right?

A. Yes, I did.

Mr. Conley: I will ask that this small white box—

The Court: Is that the envelope and the contents?

The Witness: The envelope and its contents, your Honor.

Mr. Conley: I will ask that this small white box be marked People's Exhibit 6 for identification.

(Thereupon said item was marked People's Exhibit No. 6 for identification.)

By Mr. Conley:

Q. I will ask you if you have ever seen this small white box before, Officer?

A. I have.

Q. Where was the first time you saw it?

A. The first time I saw the white box was at the Crime Laboratory at 1121 South State Street.

Q. And when? Would that be the 2nd of March, 1959?

A. No, I don't believe it was the 2nd. If my memory serves me well, I took that same white box that you have in your hand to a Coroner's inquest.

Q. Have you got a record of it when you received it, Officer, in the file you hold in your hand?

[fol. 162] A. No, but they have the record at the Crime Laboratory when I took it out.

Q. But you did receive it from the Crime Laboratory, is that right?

A. Yes, I did.

Q. And for the record this box contains a small leaden pellet. And what did you do then with People's Exhibits 1 and 2, 1 being the pistol and 2 being the shell casing after you received it?

A. I took them to the Crime Laboratory at 1121 South State Street.

Q. And you turned them over to the Crime Laboratory, Officer?

A. I did.

Q. And did you bring them to court today?

A. I beg your pardon?

Q. Did you bring them to court today?

A. Yes.

Q. To be used as evidence?

A. Yes, I did.

Q. Where did you pick them up from?

A. They were picked up at the Police Crime Laboratory.

Mr. Carey: Objection.

[fol. 163] The Court: What is the objection?

Mr. Carey: The question is, "Where did you pick them up" and the answer is, "They were picked up", which would indicate to me that it was someone else who picked them up.

The Court: They were picked up. He refers to Exhibits 1 and 2.

Mr. Carey: The question is, "Where did you pick them up" and he said, "They picked them up".

The Court: Read it.

(The record was read by the Reporter.)

The Court: They were picked up. By you, sir?

The Witness: No.

The Court: Objection sustained. Strike it out.

By Mr. Conley:

Q. By whom? Do you know who picked them up from the Crime Laboratory?

A. Yes, I do.

Q. Who?

A. My partner.

Q. What is his name?

Mr. Carey: Objection, Judge.

The Court: Sustained.

Mr. Carey: I ask that it be stricken.

The Court: Strike it out unless you can show he was [fol. 164] with his partner when they picked them up. Were you with him?

The Witness: No, I was here.

The Court: Then you don't know who picked them up.

The Witness: I don't know.

The Court: All you know is when you saw them, your partner had them. You don't know whether he picked them up or someone else.

The Witness: True.

The Court: All right.

By Mr. Conley:

Q. Did you get these from your partner?

A. Yes.

Q. And what is your partner's name?

A. His name is Frank Edwards.

Q. And what about People's Exhibits 5 and 6, did you bring them to court today?

A. I did.

Q. Where did you get them from?

A. I had them in my possession since yesterday from the same officer that I received the Exhibits 1 and 2.

Q. That is Officer Frank Edwards?

A. Yes, it is.

[fol. 165] Q. By the way, after you left the location of this restaurant, where did you go?

A. I went to the Woodlawn Hospital.

Q. And what happened there?

A. There I tried to communicate with the two persons that I saw there that—at the hospital.

Q. Were you present—

Mr. Carey: I am sorry. The train drowned it out. May I have it read?

The Court: Read it, please.

(The answer was read by the Reporter.)

By Mr. Conley:

Q. Did you succeed in communicating with them?

A. No, I received no response.

Q. Were you present when the doctor was there?

A. Yes.

Q. And what happened then?

A. I had a conversation with the doctor.

Q. Were you there when the doctor pronounced them dead?

A. Yes.

Mr. Carey: Objection.

The Court: Sustained.

Mr. Conley: I have no further questions.

[fol. 166] The Court: Cross examine.

Cross examination.

By Mr. Carey:

Q. Officer Breckenridge, you said something about finding a cartridge or a casing. Is casing a proper term?

A. Yes.

Q. At 1035 East 63rd Street, is that correct?

A. Yes.

Q. Did you find that yourself?

A. I was there when it was found and was given to me by one of the other officers.

Q. In other words, someone handed it to you, is that correct?

A. No. The discovery of the casing—

Q. Just answer my question. The answer is that it was handed to you, is that correct?

A. That is correct.

Q. By who?

A. I am not sure, one of the other officers.

Q. Was that the first time you had ever seen it?

A. The casing?

Q. Yes.

A. No, I was told that there was—

[fol. 167] Q. No, is that the first time you had ever seen the casing is when it was handed to you?

A. No, I knew it was there, one of them to see the casing. No one wanted to assume the responsibility of the case.

Q. Then you had seen it before it was handed?

A. Yes.

Q. Where was it?

A. Behind the counter at 1035 East 63rd Street near the east wall in the aisle.

Q. Now, did I understand you correctly when you said that all the exhibits, namely the pellet—is that what you call that, the leaden pellet in the box?

A. Yes.

Q. And the casing which was in the box, in the white box, and the gun were delivered to the Crime Laboratory by you?

A. Yes, they were.

Q. And that you went to the Crime Laboratory sometime after you delivered them and took one of them out, is that correct?

A. No, I don't understand you, your question.

Q. Well, you delivered these things to the Crime Lab- [fol. 168] oratory, right? Did you take these to the Crime Laboratory?

A. Yes.

Q. And then your partner gave them to you yesterday?

A. No. You misunderstood. Let's go back over this again. The three items, the three different exhibits were taken at three different various times.

Q. All right, which exhibit did you take first?

A. The casing which I don't think you have there, do you?

Q. Is this it here?

A. Yes, it is. That was taken separate from the other two.

Q. That's People's Exhibit 2 for identification?

A. Yes.

Q. This one was taken first?

A. This was taken prior to the taking of the pellet and the taking of the gun.

Q. Now, the gun is People's Exhibit 1 and the pellets are People's Exhibit 6, both for identification, is that correct?

A. The gun is 1. This is 6.

Q. Right?

[fol. 169] A. Right.

Q. Now, did you say that you went to the Crime Laboratory and took something to the—and took something from them and took it to an inquest?

A. Yes.

Q. And what was that?

A. As I recall, I had a gun at the inquest and I am not sure presently whether I took the pellets because they might have been still under consideration. I don't remember.

Q. I see, and did you personally return what you took to the Crime Laboratory?

A. Oh, yes.

Q. Back to the Crime Laboratory?

A. Yes, personally, yes.

Q. Now, Officer, while you have been testifying, you have been refreshing your memory as to things with files, is that correct?

A. Not exactly. I wanted to take out something that I could show you to give you a definite time as to when I took them to the Crime Laboratory, which I have found.

Q. You have in your hand a Manila envelope which I would like the Reporter to mark Defendant's Exhibit 2 [fol. 170] for identification.

Mr. Conley: Objection, your Honor.

The Court: Overruled. It may be marked for identification. The Officer handed it to him.

(Thereupon said document was marked Defendant's Exhibit No. 2 for identification.)

By Mr. Carey:

Q. Now, Defendant's Exhibit 2, are those your reports and notes you made at the time of your investigation?

A. It is.

Q. And did you make them personally?

A. This report?

Q. Yes.

A. I did.

Q. And did you have occasion to examine them after you made the report, after you made these?

A. Yes, I did.

Q. And when is the last time you had occasion to look at them?

A. At my report?

Q. Yes.

A. Oh, let's see, an hour ago.

Q. And that was prior to your taking the stand, is that [fol. 171] correct?

A. True.

Q. And things in this report refreshed your present recollection as to things, of dates and times and what was said, isn't that correct?

A. Not exactly, no, that is not correct, because in the file, the Manila folder that you have in your hand, I had the reports from the Laboratory which I didn't look at prior to this morning.

Q. This is your own file, is that correct?

A. That is correct.

Q. Do you have any objection if I look at it?

A. I have no objection.

Mr. Carey: Do you have any objection?

Mr. Conley: I object, your Honor.

The Court: Objection overruled.

Mr. Carey: Judge, it is quite bulky and may I look at it later and finish with the cross examination of this witness subject—

The Witness: I would rather, your Honor—I mean that is a police file of mine that I did make. I would—I don't mind waiting while counsel looks at things but there is Police Department material other than what actually has been testified to.

[fol. 172] The Court: Is that entire file concerned with this case?

The Witness: That is the entire file I have compiled pertaining to this case.

The Court: You handed it.

The Witness: He said he wanted to look at it. I have nothing to conceal in the file.

The Court: Well, you look at it in the presence of the officer and return it to him.

Mr. Carey: Very fine.

The Court: Continue your cross examination.

Mr. Carey: I have no further cross examination until such time I have had occasion to look at it.

The Court: Is that all today?

Mr. Conley: That's all.

(Witness excused.)

Mr. Carey: Judge, one thing has occurred that may be—to only clarify this matter, with Officer Starr who I had cross examined; I would like to call him back for just a couple of questions rather than bring him back as my witness.

The Court: You are going to have him back here tomorrow, aren't you?

Mr. Conley: Yes.

[fol. 173] The Court: You can put him on as rebuttal. Recess until 10:00 o'clock tomorrow morning. Good night.

(Thereupon said cause was recessed until the following day, Wednesday, September 16, 1959, at 10:00 o'clock a. m.)

[fol. 174]

THE PEOPLE OF THE STATE OF ILLINOIS,

VS.

THEODORE ROBINSON.

Indictment No. 59-703

Before Judge Daniel A. Covelli.

Wednesday, September 16, 1959,
10:00 o'clock a. m.

Court met pursuant to adjournment.

Present: Mr. Robert M. Conley, Assistant State's Attorney, on behalf of the People;

Mr. Warren J. Carey and Mr. Harold E. McDermid, on behalf of the Defendant.

The Clerk: Theodore Robinson.

Mr. Conley: We are ready to proceed, Judge.

The Court: Proceed.

Mr. Conley: I would like to recall to the stand Officer Breckenridge.

The Court: Call Officer Breckenridge.

[fol. 175] ROBERT BRECKENRIDGE, a witness recalled on behalf of the People, having been previously duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Conley:

Q. What is your name, sir?

A. Robert Breckenridge.

Q. And you are a police officer of the City of Chicago, is that right?

A. I am.

Q. Are you the same Officer Breckenridge who testified yesterday?

A. I am.

Q. And you realize you are still under oath?

A. I do.

Q. Now, Officer, you testified that you arrived at the scene of this shooting at 1035 East 63rd Street on February 28, 1959, is that correct?

A. I did.

Q. Is that in Chicago, Illinois?

A. It is.

Q. Now, you testified, Officer, that when you received the gun which was People's Exhibit 1 for identification, [fol. 176] there was a clip inside of it in which there was one unspent cartridge, is that correct?

A. Yes, I testified to that.

Q. And what did you do with that cartridge?

A. That cartridge I kept with the gun and took it to the Crime Laboratory on March 2nd.

Q. And what happened to it after that, if you know?

A. I don't know after I took it to the Crime Laboratory. I received a receipt for it and I left it there.

Q. And did you bring it to court today?

A. I did.

Q. Who picked it up from the Crime Lab, if you know?

Mr. Carey: Objection.

The Court: If he knows.

Mr. Carey: Oh, excuse me.

The Witness: The gun has been in my possession since the court trial began. However, originally as I stated yesterday, my partner Frank Edwards brought the gun from the Crime Lab over to the courtroom for me to have in evidence.

[fol. 177] By Mr. Conley:

Q. What about the unspent cartridge? How did that get here?

A. The unspent cartridge was also in an envelope that was brought over with the gun.

Q. And have you got that cartridge with you, the loaded unspent cartridge?

A. I do have, yes.

Mr. Conley: I will ask to have this unspent cartridge which is a .25 caliber—

The Witness: I believe it is .25 caliber.

Mr. Conley: —.25 marked People's Exhibit 7 for identification.

The Court: Mark it, please.

(Thereupon said item was marked People's Exhibit No. 7 for identification.)

By Mr. Conley:

Q. And you brought the cartridge, the unspent cartridge which is People's Exhibit 7 for identification to court to be used as evidence in this case, is that right?

A. I did, yes, sir.

Mr. Conley: I have no further questions.

The Court: Cross examine.

[fol. 178] Cross examination.

By Mr. Carey:

Q. Are you familiar with the type of gun that you have here in court, the .25 caliber?

A. Would you repeat that for clarification?

Q. Are you familiar with this type of a gun, and I am referring to People's Exhibit 1 for identification?

A. You mean the operation?

Q. Yes.

A. Oh, I am not too familiar with the operation of automatic type guns.

Q. Do you know how many cartridges this holds?

A. I couldn't state how many cartridges that gun holds, no.

Q. O. K. The cartridge which was given to you, People's Exhibit 7 for identification, was in the gun?

A. Yes.

Q. And in the chamber?

A. It was in the chamber when it was given to me at the 7th District station, yes.

Q. And this is a gun that ejects cartridges, is that correct, the casing?

[fol. 179] A. Most automatic type guns I have read and have been told do eject their shells.

Q. Do I understand you, Mr. Breckenridge, that from the time that you deposited these items with the Crime Laboratory, with the exception of your taking one out for the Coroner's inquest, that these were with the Crime Laboratory, as far as you know?

A. Oh, yes. Yes, I say from—

Q. Until you picked them up at the beginning of this week or Tuesday?

A. No. On other occasions wherein we were to go to trial I had—rather had taken the items from the Crime Laboratory and brought them to court. However, by the continuance of the case, they were returned or—

Q. They were returned then to the Crime Laboratory?

A. Were returned or in my possession.

Q. Now, Mr. Breckenridge, you talked about something yesterday.

I had concluded my cross examination yesterday, subject to reading the reports of Mr. Breckenridge. So I am going more than what was brought out on re-direct.

Mr. Breckenridge, you talked something about a showup [fol. 180] being conducted on the 2nd or 3rd of March, 1959, is that correct?

A. March 1, the showup was.

Q. And there were how many men in this lineup?

A. There were five men in the lineup.

Q. How many—do you know who they were?

A. I believe I could recall the names of two or three of the men.

Q. All right, would you give me the names of two or three?

A. One name was Claude Wiley.

Q. Now, he is a police officer assigned to the 7th District, is that correct?

A. That is correct.

Q. And was he in or out of uniform at that time?

A. He was out of uniform.

Q. And will you tell us something about his appearance? How tall is he?

A. I would say between five-nine or five-eight to five-ten.

Q. How much does he weigh?

A. 160, I imagine.

Q. And did he wear glasses?

A. No, he doesn't.

[fol. 181] Q. And what about his complexion?

A. Medium brown skin.

Q. Is he a Negro gentleman?

A. Yes, he is.

Q. Does he look like the defendant in your opinion?

(Thereupon a discussion was had between Court and counsel outside of the hearing of the witness and court reporter.)

By Mr. Carey:

Q. And the other men in the lineup were also policemen, is that correct?

A. That I can't definitely state.

Q. But the two or three you remember would be policemen, is that correct?

A. Two definitely that I recall as being policemen. The others I believe could have been taken from the lockup downstairs.

Mr. Carey: There will be no further questions.

Mr. Conley: You may step down.

The Witness: Thank you.

(Witness excused.)

Mr. Conley: Will you get Simons?

The Court: Were you sworn?

The Witness: No.

[fol. 182] The Court: Swear this witness, please, Mr. Clerk.

KASMIR SIMONS, a witness called on behalf of the People, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Conley:

Q. What is your name, please?

A. Kasmir Simons, K-a-s-m-i-r Simons, S-i-m-o-n-s.

Q. What is your address?

A. 10960 Church Street, Chicago 43, Illinois.

Q. Where are you regularly employed?

A. I am assigned to the Chicago Police Scientific Crime Detection Laboratory and I am assigned to the firearms identification section.

Q. What schools have you attended?

A. Morgan Park High School.

Q. How long have you been on the Chicago police department?

A. 30 years.

Q. And have you any experience with regard to firearms and their use?

A. Firearms has been my hobby for more than 30 years. [fol. 183] I have done considerable hand loading, numerous calibers.

Mr. Carey: Objection.

The Court: You have answered the question. Is that your objection? What is the objection?

Mr. Carey: The objection is that he is giving his conclusion, his considerable time in reloading and so forth.

The Court: Sustained. Just give the facts instead of conclusions.

By Mr. Conley:

Q. Just what is your experience with regard to firearms, Mr. Simons? Have you ever conducted experiments and what kind and how many?

A. Yes, I have. I have done considerable hand loading in various calibers and I have conducted experiments using various components and loading methods necessary to produce accuracy in these various calibers. I have been range officer for the Police Training Division for the Chicago Police Department and I have given instructions in the use of the revolver, the shotgun and sub-machine guns. I have been an active competitor in many revolver, rifle and shotgun matches. I have attended the matches at Camp Perry, and I hold a certificate as a qualified instructor in

[fol. 184] small arms issued by the United States Army.

Q. And what if any books or works have you studied on the subject?

A. I have in my personal library such standard literature on firearms and firearms identification as "Firearms Investigation, Identification and Evidence", by Julian S. Hatcher, "The Identification of Firearms" by Gunther and Gunther, "The Identification of Firearms and Forensic Ballistics" by Major Gerald Burrard. I have the NRA textbooks on rifles and pistols. I have numerous other firearm books in my library. I have kept abreast of current developments in the field of firearms identification by reading the police science section of the Journal of Criminal Law and Criminology and the American Rifleman.

Q. Have you ever observed the manufacture of firearms or munitions?

A. I have observed the manufacture and operations at the Western Cartridge Company at East Alton, Illinois, the Remington Cartridge Company at Bridgeport, Connecticut, the Winchester Cartridge Company at New [fol. 185] Haven, Connecticut, Federal Cartridge Company at Minneapolis.

I have observed the manufacture of firearms and gun barrels at the Harrington & Richardson Revolver Company at Worcester, Massachusetts, Smith & Wesson Revolver Company at Springfield, Massachusetts, Colt Patent Fire Arms in Hartford, Connecticut, Winchester Repeating Arms, O. E. Morsberg at New Haven, Connecticut.

Q. Now, what are your particular duties at the Chicago Police Crime Detection Laboratory?

A. My duties are to receive and make detailed examination of firearms evidence such as various weapons, bullets and cartridge cases that are submitted by the department and I am expected to render a report of my findings.

Mr. Carey: Objection.

The Witness: And I render—

The Court: Overruled. Go ahead, please.

The Witness: This examination of weapons consists of the determination of the caliber, in other words, class and individual characteristics. I fire test shots from weapons submitted and by the use of the comparison microscope determine whether or not weapons submitted are involved.

[fol. 186] I do this work eight hours a day, nothing else but just firearms work.

By Mr. Conley:

Q. And how long have you been doing that particular kind of work?

A. Since 1947.

Q. Can you give us a description of what you call a comparison microscope and how it operates?

A. Comparison microscope consists of two microscopes equipped with matched optics. The microscopes are placed side by side and they are connected with a comparison bridge. The microscopes are equipped with separate stages for the handling of bullets and cartridge cases and with proper illumination.

When an operator looks through this instrument, he observes a split field. In the left half of the field of view, he sees the object placed under the left microscope, and in the right half he sees the object placed under the right microscope. In making a comparison of two bullets on this instrument, the bullets are placed under each microscope and one bullet is rotated until a point of similarity is observed. And then both bullets are rotated simultaneously and the fine marks or striations are studied and observed if they coincide from one bullet to the other at the [fol. 187] point where the field is split.

In examining cartridge cases, the technique is similar except that firing pin indentations, breech block markings or primer and head of the cartridge case and extractor and ejector marks are studied.

Q. Now, about how many tests have you conducted on various firearms during the course of your duties at the Chicago Police Crime Detection Laboratory?

A. Oh, I have examined more than 8,000 weapons while I have been there and—

Q. About how many comparison tests have you made during the course of your duties?

A. More than 5,000.

Q. Now, Mr. Simons, I will show you People's Exhibit 1 for identification which is a .25 caliber automatic pistol and ask you if you have seen that before?

A. Yes, I have.

Q. And will you describe that pistol, please? I am not an expert. Maybe you had better say what it is.

A. This is a .25 caliber Colt autoloading pistol known as a vest pocket weapon. It has a manual safety and it has a [fol. 188] grip safety. The magazine holds six cartridges and if one is put into the chamber, it is six plus one. It is a very compact weapon. It has a barrel $2\frac{1}{8}$ inches long and it is known as a semi-autoloading pistol and the way this weapon functions is that magazine is charged with six cartridges. They are inserted into the grip of the weapon and the slide is drawn back and retracted and it comes forward under the tension of the recoil springs and it strips one cartridge from the magazine into the chamber and seats it and when the trigger is pulled, then forces the slide back and at that particular time there is a cartridge case extracted and ejected from the weapon and the slide moves forward under tension and strips another cartridge from the magazine and chambers it, ready for the second shot.

Q. Now, when did you first see that weapon, Mr. Simons?

A. On March 1, 1959, it was submitted to the laboratory.

Q. By whom was it submitted?

A. Officer Breckenridge of the 7th District.

Q. And were you present when he submitted it?

A. Yes, sir, I was.

[fol. 189] Q. I will show you People's Exhibit 2 for identification which is an empty shell casing and I will ask you if you have seen that before?

A. Yes, I have.

Q. And when did you see that?

A. The same date, March 1st, 1959, that was also submitted by Breckenridge.

Q. At the same time and place as People's Exhibit 1?

A. Yes, sir, same day.

Q. I will show you People's Exhibit 5 which is the Coroner's Bullet Envelope and I will ask you if you have seen that before?

A. Yes, I have.

Q. Where and when?

A. March 1st, 1959. This is a Coroner's Bullet Envelope and I have marked, received 3/1/59, with my initials on it, and I have my case number, and I received that envelope on that date.

Mr. Conley: Can we wait just a minute until the police officer gets something?

Q. Now, I will show you People's Exhibit 5 for identification and ask if that is the envelope you told us about? [fol.190] A. Yes. I received this envelope on March 1st, 1959. It was submitted by Officer Breckenridge.

Q. Now, what if anything was in that envelope at that time?

A. I found a .25 caliber metal tipped fired bullet. I removed the bullet from the envelope. I marked it for identification. I then processed it like I would any other—any other evidence bullet.

Q. Now, I show you People's Exhibit 6 for identification, which is a small box containing a leaden pellet and I will ask you if you have seen that before?

A. Yes, I have.

Q. Is that the pellet that you described as being in People's Exhibit 5?

A. It is, yes.

Q. Now, I will show you People's Exhibit 7 for identification which is the unspent cartridge.

A. Yes, sir, I have seen that before.

Q. Have you seen that before?

A. Yes, sir, I have.

Q. Where did you see that and when?

A. That was submitted with People's Exhibit 1, the .25 caliber auto pistol.

[fol. 191] Q. Now, Mr. Simons, did you conduct any tests on any of these exhibits?

A. Yes, I did.

Mr. Carey: Objection.

By Mr. Conley:

Q. What was the test?

The Witness: I fired two—

The Court: Overruled.

The Witness: I fired two test shots from People's Exhibit 1 into a bullet recovery box.

By Mr. Conley:

Q. What is the bullet recovery box?

A. It is a box approximately 10 by 10, about 5 feet long and one end is a telescoped end. It can be drawn in and out. One end of this box is open and it is filled with a cotton waste material and these cotton batts are arranged in this box and shots are fired into this cotton material and the tests are recovered from this bullet recovery box and also, of course, the discharged cartridge case that is expended at the same time.

Q. And did you recover the pellets that you shot into the bullet recovery box?

A. Yes, sir, I did.

Q. Did you recover the cartridge that was ejected at the time you fired these test shots?

[fol. 192] A. Yes, I did.

Q. Have you got those pellets and cartridge cases with you?

A. Yes, sir, I have.

Q. May I see them?

I will ask that this small white box which contains two leaden pellets and two empty cartridge cases be marked People's Group Exhibit 8 for identification.

(Thereupon said items were marked People's Group Exhibit No. 8 for identification.)

Now, do you know who put this writing on the box?

A. That is my writing, yes.

Q. And what tests did you conduct? That is, what comparison tests if any did you conduct?

A. I first took my two test bullets and placed them under a microscope and I brought them into what I call a matched position. I could see that—brought them in a position where the striations and the fine markings coincide from one bullet to the other. Then I removed one of the test shots and I placed under the microscope a fired bullet, Exhibit [fol. 193] 6, which I took from the Coroner's Envelope and I made a comparison examination.

Then I took the two test cartridges, made a comparison examination, and then I removed one and I placed People's Exhibit 2 which is a discharged .25 caliber cartridge casing and I made a comparison examination.

Q. What is your opinion, Mr. Simons, based on your experience as to the weapon that fired both the People's Exhibit 2—I mean People's Exhibit 4 which is the pellet, People's Exhibit 2 which is the empty shell casing and People's Group Exhibit 8?

Mr. Carey: Objection.

The Court: Sustained. Objection sustained.

The Witness: On the—

The Court: No, objection has been sustained.

By Mr. Conley:

Q. Now, Mr. Simons, did you compare the two empty shell casings that are part of People's Group Exhibit 8 with the empty shell casing which is People's Group Exhibit 2?

A. Yes, I did.

Q. And what is your opinion as to what weapon they were fired from?

[fol. 194] Mr. Carey: Objection.

The Court: Overruled.

Mr. Carey: Judge, I am objecting on the man's qualifications as an expert, as I heard the testimony; if I may be heard on that.

The Court: Yes.

Mr. Carey: As I have the testimony, he is a graduate of Morgan Park High School, he has as a hobby firearms, that he was once a range officer for the City of Chicago, that he has gone to rifle matches of the United States Army, that he has in his library several books, one by Hatcher, one by Gunther and Gunther, and one by Burrard, that he has made 5,000 tests of pellets and 8,000 examinations of guns. Outside of that, we have nothing which would indicate what the tests were. Whether he has the books, the evidence that he has read them or anything which would indicate or that would qualify him as an expert.

I submit to the Court, I could have done all of these things, graduated from high school, have firearms as a hobby and been a range officer and still not be an expert and still have all of these things; and I understand there are some attorneys in the building who have all of these books [fol. 195] and still are not experts and still have made tests. I submit to the Court that this man is not qualified to give his opinion as to the comparisons.

Mr. Conley: Your Honor, there were quite a bit more qualifications than that. This witness has worked for 27 years with the Chicago police department and has conducted thousands of tests. Regardless of what books are in a man's library, he has conducted thousands, at least 5,000 comparison tests. He certainly should be considered an expert in that field.

The Court: Objection overruled. Answer it. Answer the question.

Mr. Conley: Will you read the last question?

(The question was read by the Reporter as follows: "And what is your opinion as to what weapon they were fired from?")

The Witness: It is my opinion based on similarity of class and individual characteristics that the discharged cartridge case, People's Exhibit 2, was discharged in the .25 caliber pistol, People's Exhibit No. 1.

[fol. 196] By Mr. Conley:

Q. And have you an opinion as to People's Exhibit 6?

A. Yes, I have.

Q. What is that opinion?

A. On the basis of similarities of class and individual characteristics, it is my opinion that the fired .25 caliber bullet, People's Exhibit 6, was fired from the .25 caliber Colt auto pistol, People's Exhibit 1.

Mr. Conley: You may cross examine.

Cross examination.

By Mr. Carey:

Q. What are your hours of duty, Mr.—

A. From 8:00 to 4:00.

Q. Is that every day?

A. Yes. Not every day. For many years, it was 48 hours a week and now it is 40. Sometimes I work longer.

Q. Well, what are the hours? Do you have regular days that you work, all day, to Friday?

A. Yes, I work Monday through Friday and if I work a little overtime, well, I am compensated for it.

Q. Are those the days you work, Monday through Friday?

[fol. 197] A. On Saturdays, if there is something that comes in, I will work, and Sunday.

Q. Now, is Sunday generally your day off?

A. As a rule, work lesser on Sunday, it has been. Prior to that, we worked seven days—

Q. When was the last Sunday that you worked?

A. I wouldn't remember. I couldn't recollect.

Q. Well, was it within the last year?

A. It may have been.

Q. You don't know? Was it within this year?

A. Could have. I don't recall with any accuracy.

Q. Now, you have given us your opinion, Mr. Witness, in reference to these exhibits. And do you base your opinion upon your experience as a firearms expert and being a range officer and having seen these various gun factories and books you have in your library and so forth? Is that what your opinion is based upon?

A. My—

Q. And the comparison of the pellets under the microscope?

A. Yes. My opinion is based on the amount of work I have done on this. There isn't a recognized school in firearms identification that a person can attend. This is strictly [fol. 198] more a skill than it is any dark science and all that in reality is that you compare are the tool marks that are the individual characteristics that are engraved on a bullet from the rifling of the weapon. And the cartridge case, it is the firing pin indentation, and there are no two things exactly alike in this world. The firing pin has its own individual little markings, and it is like if I took a pencil and dropped it into something soft. It has that individual marking and it really, I would say, is a skill, and I have done it for many years. In fact, I have my own comparison microscope at home. I don't have many other hobbies. Firearm just happens to be that.

Mr. Carey: No further questions.

The Court: Any redirect?

Mr. Conley: No redirect.

The Court: You are excused, sir. Call another witness.

(Witness excused.)

The Court: Have you been sworn, sir?

The Witness: No, I haven't.

The Court: Swear the witness, Mr. Clerk.

[fol. 199] FRANK EDWARDS, a witness called on behalf of the People, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Conley:

Q. What is your name, please?

A. Frank Edwards.

Q. And your business or occupation?

A. Police officer, 7th District, Chicago police.

Q. You are the partner of Officer Breckenridge, is that right?

A. That's right.

Q. Now, calling your attention to the exhibits in this case, did you pick them up from the Crime Laboratory?

A. Yes, I did.

Q. And who was present when you picked them up?

A. Well, in the Crime Lab, I got these three white boxes containing pellets and Officer Benz turned them over to me at the Crime Lab.

Q. Was Mr. Simons present at the time?

A. Yes, he was.

Q. And what did you do with the boxes at that time?

[fol. 200] A. I brought them directly over here and I gave them to Officer Breckenridge.

Q. Was the gun also in this group?

A. I was given some envelopes at the Custodian's office but I didn't examine the contents of the envelopes.

Q. I will show you a brown Manila envelope and I will ask you if you have seen that before?

A. Yes, I have.

Q. Is that the envelope that you picked up at this time that you are telling us about?

A. Yes, I did.

The Court: What exhibit is that?

Mr. Conley: We will ask to have that marked People's Exhibit 9.

(Thereupon said document was marked People's Exhibit No. 9 for identification.)

By Mr. Conley:

Q. How do you know it is the same envelope that you picked up?

A. Well, by the markings here. (Indicating) The number was in the same place and it had the same markings on it that are on it now; the markings also I notice now, [fol. 201] and I guess it is a case number.

Q. And it is the inventory number stamped on it, is that right?

A. Yes, yes.

Q. And you turned these over to Officer Breckenridge?

A. That's right.

Mr. Conley: Your witness.

Mr. Carey: No questions.

The Court: Step down.

(Witness excused.)

STIPULATION AS TO PEOPLE'S EXHIBITS 1 THRU 8

Mr. Conley: Your Honor, we have one other witness, Dr. Goldenberg, from the Coroner's office. I understand he left his home about 9:00 o'clock this morning to come to the Criminal Court here and as yet I haven't seen him. I expect him momentarily.

The Court: Can you stipulate?

Mr. Carey: I agreed to stipulate, Judge. If you will remember, at the beginning I said I will stipulate to the protocol of the Coroner, and I am still willing to do that.

Mr. Conley: Well, there is a little more involved here, Judge, than the cause of death. There is People's Exhibit 5 which is the envelope in which Dr. Goldenberg put the [fol. 202] pellet after he had extracted it from the body of the deceased, and there is a question of evidence here as well as the cause of death.

Mr. Carey: I have no objection to stipulating.

The Court: Do you have any objection to People's Exhibit 5 being received in evidence?

Mr. Carey: Just for the record, that's all.

The Court: Then you won't need the Doctor.

Mr. Carey: I will stipulate if the Doctor were called, he would testify that such a pellet—whatever he did.

The Court: That that is the pellet?

Mr. Carey: That that is the pellet.

The Court: All right.

Mr. Carey: That the matter was turned over.

Mr. Conley: Stipulated then that People's Exhibit 6, the pellet that was extracted from the person of Flossie Ward—

The Court: Stipulated if the Doctor were here, he would testify that People's Exhibit 6 is a pellet which he extracted from the body of the deceased in this case, is that right?

Mr. Carey: That is correct.

Mr. Conley: Yes. And he would further testify that he [fol. 203] placed it in the envelope which is People's Exhibit 5, signed his name on it and turned it over to the police.

The Court: So stipulated?

Mr. Carey: Yes, so stipulated.

Mr. Conley: And we will offer all these exhibits into evidence, Judge.

Mr. Carey: There is an objection for the record.

The Court: All right, let's number them. They are offering Exhibits 1 to 8.

Mr. Carey: 1 through 8, Judge.

The Court: Your objection is overruled. Exhibits 1 through 8 are received.

(Thereupon People's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, and 8 for identification were received in evidence and marked as People's Exhibits 1, 2, 3, 4, 5, 6, 7 and 8, respectively, and are in words and figures as follows:)

[fol. 204] Mr. Conley: And it is further stipulated by and between the defendant through his attorney and the State's Attorney of Cook County that if Dr. Goldenberg were to testify, he would testify that he conducted an examination on the body of Flossie May Ward on March 1, 1959, and that in his opinion the said Flossie May Ward came to her death because of multiple extreme injuries following a gunshot wound of the head. So stipulated?

Mr. Carey: Yes.

Mr. Conley: And the State will rest.

The Court: Age?

Mr. Conley: What is the age of the defendant?

Mr. Carey: 32.

The Defendant: 1.

Mr. Carey: 31.

The Court: 31. Stipulated that the defendant is 31 years of age?

Mr. Carey: Yes.

The Court: State rests?

Mr. Conley: State rests.

(The State Rests.)

The Court: You may proceed with your defense.

Mr. Carey: If the Court please, I don't see my associate [fol. 205] here. I will request a short recess. Mr. McDermid is going to handle the defense side of it.

The Court: We will take a ten minute recess.

(Recess taken.)

The Clerk: Theodore Robinson.

The Court: You may proceed with your defense.

STIPULATION AS TO DEFENDANT'S EXHIBIT No. 3

Mr. Carey: Judge, we have a stipulation, as the Court will recall, at the beginning of this matter which was the official record from Kankakee State Hospital brought to this court under a subpoena duces tecum by a Mrs. Smith. I would like to have it marked Defendant's Exhibit 3 for identification.

(Thereupon said document was marked Defendant's Exhibit No. 3 for identification.)

I would like to say that Mr. Conley has had an opportunity to examine this and it is in the same condition at the time he examined it as it is now. I would like to offer Defendant's Exhibit 3 for identification into evidence as Defendant's Exhibit 3.

The Court: Any objection?

Mr. Conley: No objection.

[fol. 206] The Court: There being no objection, Exhibit 3 is received.

(Said document, having been so offered and received in evidence, was marked Defendant's Exhibit 3, and is in words and figures as follows:)

[fol. 207] COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Carey: If the Court please, Mr. McDermid, he is in the hall. I went to get him once. I will bring him in.

The Court: Let's proceed, please. We have wasted fifteen minutes. We have thousands of indictments waiting for trial. I can't waste fifteen minutes waiting for defense counsel. Let's move.

Mr. McDermid: I am sorry, your Honor. There was a motion to exclude witnesses, your Honor, and I do notice that some—three of my witnesses are presently in court.

The Court: It is your duty to see that they are out, particularly when you make the motion to exclude them.

Mr. McDermid: You may stay, and take the stand.

The Court: Have you been sworn, Madam?

The Witness: No.

[fol. 208] The Court: Swear the witness, please.

(Witness sworn by the Clerk.)

Mr. McDermid: May I have one minute to satisfy—

The Court: We have wasted eighteen minutes. You must prepare your lawsuit before you come to court. We have been on trial now for a whole day and a half and you have had ample time to talk to your client. Go ahead, talk to him now.

Mr. McDermid: This is something that came up that I didn't anticipate, your Honor.

The Court: All right.

(Thereupon a discussion was had between Mr. McDermid and the defendant outside the hearing of the Court and the Reporter.)

(Defendant, standing at the Bar.)

Mr. McDermid: Just for the record, your Honor, may I say that the defendant is concerned about the subpoenaing of certain witnesses whose names were on the witness list. Warren Carey and I have investigated them. We do not believe that they would add anything to this matter. However, he feels that because they were on the list, that he wants everybody to testify. That is the objection that the [fol. 209] defendant is making at this time.

The Defendant: Judge, your Honor, they were on the State's witness list and the State said they had several witnesses. They produced two. For what reason, I don't know, but I am on trial here and I would like to be given every consideration and I would like—

The Court: You will get every consideration.

The Defendant: I would like that the court be adjourned until tomorrow morning.

The Court: No, sir.

The Defendant: To give me time to confer with counsel for the calling of witnesses.

The Court: No, sir. We have been waiting here since 11:00 o'clock, waiting for your lawyer. It is now 11:30. We have been on trial a day and a half.

The Defendant: I thought it was by agreement. When I saw him, I told the lawyer we weren't ready now.

The Court: No, sir. Who are the witnesses you want?

The Defendant: I don't have the list; if I could see the list.

The Court: Get the list. Who are the witnesses?

[fol. 210] Mr. Conley: I am handing our list of witnesses to counsel now.

Mr. McDermid: And I am handing this to Theodore Robinson so that he can satisfy himself at this time.

The Defendant: I am unfamiliar with any of those names whose names appear on the list.

The Court: Which witness do you say that you want?

The Defendant: I understand that there was other people present besides the one that was presented here to the Court.

The Court: Well, who are they?

The Defendant: I do not know by name.

The Court: If you don't know them—

The Defendant: I couldn't tell by looking at the list here because I do not know the names of the people on the list.

The Court: If you will tell your counsel what witnesses you want—

The Defendant: If the State has a list of the ones, the witnesses, that they didn't call, I would ask the State's Attorney to familiarize me with the list.

The Court: Is this the complete list?

[fol. 211] Mr. Conley: Excuse me, Judge. There were witnesses that were not called in this case, one of which could not be found. That is—

The Court: Who was that?

Mr. Conley: A Miss Butler. And a Mary Lou Collins, I understand, was served but she left on a plane for California yesterday around noon, so she is not available. And, of course, the one who can't be found is not available. How-

ever, they would be State's witnesses and there is nothing that I would like better than to have those two people here. The other witnesses who were not called were police officers, partners of the officers that testified and their evidence would only be cumulative and similar to the testimony that has been heard already.

The Court: Which witnesses do you want to call?

The Defendant: The witnesses that testified here for the State said that there was six or seven, eight some people present there at the time and whoever those people are, I mean if they were present at the time they arrived, the investigating officer arrived at the scene of the crime—

The Court: Do you have the list of witnesses that were [fol. 212] in the restaurant at the time of the shooting?

Mr. Conley: Yes, Maxine Butler, the one which I referred to already.

The Court: Is that the one who went to California?

Mr. Conley: No, sir, that is the one who hasn't been found.

The Defendant: I am talking about the patrons, the people they say—

The Court: That is what I am talking about.

Mr. McDermid: My investigation has not been able to turn up the names of any of the patrons that were in the place.

The Court: Do you have the names of the patrons, Mr. State's Attorney?

Mr. Conley: No, sir, we don't.

The Court: Do the police have them?

Mr. Conley: I don't think they have, Judge.

The Court: Is Breckenridge here? Get him out here.

Mr. Conley: The police naturally were interested in finding as many witnesses as possible, and I am convinced that this list of witnesses includes all that were found, including [fol. 213] the names and addresses of them.

The Defendant: Also, Judge, your Honor—

The Court: Officer Breckenridge, did you get the names of the patrons that were in the restaurant at the time of the shooting?

Officer Breckenridge: No, all of them fled, your Honor.

The Court: They were not there when you arrived?

Officer Breckenridge: No, sir.

The Court: What else do you want, Mr. Robinson?

The Defendant: Well—

Mr. McDermid: May I say, your Honor, to the witnesses and one of the witnesses I did speak with was Mary Lou Collins, one of the persons listed here who apparently is now in California, and it would not be in my judgment that she would be helpful in this matter in any pertinent degree and that she told me that she did not see the occurrence.

The Court: Very well. Anyone else you want, Mr. Robinson?

The Defendant: Well, I asked the attorney yesterday to subpoena Mr. and Mrs. Robert Moore.

The Court: What do they know about it?

The Defendant: In whose apartment I was arrested in, [fol. 214] I mean arrested near.

The Court: What will they testify to?

The Defendant: Well, I do not know, sir, but I would like to have them subpoenaed in court.

The Court: We can't subpoena people unless you tell us what they are going to testify to.

The Defendant: Well, the police are contending that the clothes they have found in Moore's apartment was mine. That is the reason at the beginning of the trial, I asked the attorney to have a pretrial preliminary to determine the admissibility and the validity of the evidence that the State was intending to use against me.

The Court: Let's hear the rest of the evidence and we will decide on that. Let's proceed with the trial.

Mr. McDermid: May I say for the record, however, that I do not recall him asking me to subpoena the Moores in yesterday, and I think that you will have a chance to talk to Mr. Warren Carey in a few minutes again and he will be able to satisfy you.

The Defendant: The court was recessed and I asked him to come back and he didn't. He failed to comply.

The Court: Let's proceed. At the recess for lunch, you [fol. 215] can talk to your lawyer then.

The Defendant: All right.

(Defendant seated at counsel table.)

WILLIE CEOLA PETERSON, a witness called on behalf of the Defendant, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McDermid:

Q. Would you state your name, please?

A. Willie Ceola Peterson.

The Court: Willie Ceola Peterson?

The Witness: Willie Ceola Peterson.

The Court: All right.

By Mr. McDermid:

Q. I will stand back here. You speak up so I can hear you and everybody will hear you. What is your address, Miss Peterson?

A. 414 East 44th Street.

Q. Where is that located, in what city?

A. Chicago, Illinois.

Q. And what is your relationship to the defendant?

A. Mother.

Q. Where was Theodore born?

[fol. 216] A. Chicago, Illinois.

Q. Where were his early years spent, in what city?

A. Chicago, Illinois.

Q. Is his father alive at this time?

A. No, deceased.

Q. How old was Theodore when his father died?

A. About seven.

Q. What was Theodore like as a little boy?

A. Well, he was a very nice, affectionate child in growing up.

Q. Do you remember any unusual occurrence in his first ten years of life that you would feel remarkable?

A. Yes. A girl went on the third floor and dropped a brick down and fell on his head when he was between the age of seven and eight, so she knocked him out. He blacked out and the blood run from his head like a faucet and they had to pick him up and run him to a doctor.

Q. And was there any change in his behavior after this incident?

A. Well, he acted a little peculiar but not enough that I took time out to see about him because I had to work.

[fol. 217] Q. Was there any change in his appearance after that?

A. Well, yes. He was knocked cockeyed. He got cock-eyed and I had to run around and I had taken him to an eyeglass doctor, a specialist, trying to correct the crossness of his eyes.

Q. When you say cockeyed, you are referring to his eyes?

A. Yes, they were crossed.

Q. Did your son go into the military service at all?

A. Yes, he did, the first day he made eighteen, he went in.

Q. Do you know approximately what year that would be?

A. In 1945, I think.

Q. Now, prior to his going into the service, did anything unusual occur that you can recall?

A. Well, after he went in service and returned home—

Q. Excuse me. Prior to, before going into the service, in that period from ten years until he went in the service, do you remember any unusual circumstances occurring?

[fol. 218] A. No.

Mr. Conley: Your Honor, if I may interrupt, I think I have to object at this point. I don't think this is proper evidence for the case on trial. It might be proper in mitigation but I can't see how any of this is material to the issues before the Court.

The Court: Well, he is trying to show me the background of the defendant. Overruled. Go ahead.

By Mr. McDermid:

Q. Now, during the period that he was in the service, did you see your son at that time?

A. When he come home on a furlough, yes.

Q. Did anything unusual occur during that time?

A. Well, he went out with the boys and when he come home one night, the next day he asked me to have dinner for a little girl he was keeping company with, so I did. And sitting down talking to her, he jumped up and run to a bar and kicked a hole in the bar and he run up in the front. I went back to see what had happened because I heard all my glasses break up that was in the bar and I asked him what on earth was wrong with him and he just stared at me, and paced the floor with both hands in his pockets.

Q. And at that time, what did you do after that?

[fol. 219] A. Well, my husband told me not to call the MP's to take him back, maybe he would get over it and get himself adjusted.

Q. Did anyone else come over to your house that same day?

A. Well, the next morning I got up, I called a friend of mine and asked her would she come over and talk to him and see what's wrong with him because I thought maybe he was losing his mind. He had such a glare in his eyes and he didn't seem to adjust in stepping up to talk to me.

Q. Who was this person who came to talk to you?

A. Mrs. Alice Moore.

Q. Now, after he came back from the service, when was the first time if at all that you noticed any unusual circumstance occur?

A. Well, I had noticed it all along since he had been out of service, that he keeps a glare in his eyes and he

seemed to be lost in himself and he seemed to be in deep study most of the time and when I walked up and try to talk with him, he starts to glare and says nothing is wrong.

Q. Has he made any complaints of being ill?

A. Well, he usually complains of headaches all the time [fol. 220] and I begged him to let him go to the doctor with me to see about himself but he only promised that. I was never able to get him there.

Q. When did you first notice that he had headaches?

A. Well, when he was a child growing up, he complained of headaches.

Q. You don't remember exactly what age or the year that he first began to complain of headaches?

A. Well, after this brick struck him in the head.

Q. Now, turning your attention to 1951, did anything unusual occur in that year that you recall?

A. Yes. In 1951, Theodore lost his mind and was pacing the floor saying something was after him.

Q. Would you tell us how that happened? Where was this that this happened?

A. Theodore went over to an aunt of his. He said four o'clock in the morning—

Q. What is her name?

A. Helen Calhoun. She let him in and she had been up with him from four to six so she called me and I caught a cab and went to see about him. And she had a time opening the door to let me in because he wouldn't let her open the door. Someone was going to shoot him or some- [fol. 221] one was going to come in after him, and when she did get him calm enough, she opened the door as he walked back facing the window. And when I went in, I went to him and hugged him to ask him what was wrong and he went to pushing me back, telling me to get back, somebody was going to shoot him, somebody was going to shoot him.

Q. Did you observe his face at that time?

A. Yes, sir. He had that starey look and seemed to be just a little foamy at the mouth.

Q. Was there anything else unusual about him?

A. Well, yes. He didn't seem to hug me and show his affection to me.

Q. Did he behave?

A. Well, we had to call the police in and he wouldn't let us open the door for the policemen so when we finally—one of us pushed him back to the window and one of us opened the door and the law come in and he said, "Well, looks like he has got to go." So I told him, I said, "Go where?" He said, "Well, he has lost his mind." I said, "Yes". He said, "Well, I can't take him to Hines Hospital but I'll get you a cab and send you out there."

Q. And you did go to Hines Hospital?

[fol. 222] A. Yes, we took him to Hines.

Mr. McDermid: I am sure she will be able to control herself.

Q. And how long did you stay at Hines Hospital?

A. They kept us there just about half of the day and they sent us to the County with him in the ambulance. So we had to hold him in the car in taking him because he kept trying to jump out.

Q. And from County Hospital, where did he go at that time, do you remember? Do you remember what department he was in at the County Hospital?

A. No, they kept him in the receiving room.

Q. And do you know how long he was at the County Hospital?

A. He was there a week until they had court proceedings on him and they sent him to Kankakee.

Q. Do you recall how long he was at Kankakee Hospital?

A. Oh, about six or seven weeks, I think. So his wife came out. She was going to sign him out. So I told her, "If you do, whatever happens is your business. He needs to stay there and take treatment because," I said, "He is definitely off."

Q. And then he did come out, is that correct?

[fol. 223] A. Yes. Later we seen him because she said they had a baby, he was her only sole support.

Q. Did he come home and live with you at that time?

A. Yes. He didn't have any other place because he had told me so I took him in and kept him about three weeks and I told her to find a place and he would sponsor her the money and she found a place and she had to put up a deposit and I gave her the rent, first \$50 to put up.

Q. When next did you see Theodore Robinson, your son?

A. When next to that?

Q. When next did you observe anything unusual about your son?

A. Well, after he went to Kankakee and stayed, about a year later, he start cutting up again and he would visit me frequently but I noticed he didn't seem to be the same.

Q. Would you tell us what he did about a year later to make you feel that he was different?

A. Well, about a year later, he and his wife separated and he shot his baby and killed the baby and shot himself up over the ear and come out the top of his head.

[fol. 224] Q. Who was he living with at this time?

A. He had went to his aunt's with this baby, Helen Calhoun.

Q. And this was in the City of Chicago?

A. Yes, Chicago.

Q. You remember approximately what year that would be?

A. I think it was around '52.

Q. Did you see him at that time?

A. No. They didn't let me see him. They called me from Provident Hospital. That is how I happened to know about it.

Q. Do you remember any unusual behavior on his part just prior to this shooting?

A. Well, no, because I didn't visit him that often.

Q. Then what happened to Theodore after he had attempted to shoot himself? Where did he go after that?

A. Well, the police picked him up and turned him in. So they had him in court and they sent him down to Joliet.

Q. Do you recall where he was picked up by the police?

A. Out through the park on 57th Street, I think, at the [fol. 225] police station. He was wandering around out there and he walked up to one of them and asked him for a cigarette.

Q. Up to one of the policemen?

A. Yes.

Q. Do you recall what year approximately he returned from the penitentiary?

A. 13th day of September, 1956.

Q. And where did he live at that time?

A. Well, from September 13, he lived with me until January. Sometime in January, he met this girl of the last incident and he took up with her so finally she got him away from me into the house with her to live as common law.

Q. You are referring to the deceased, Flossie May Ward?

A. Yes, so I talked with him and I told him that I didn't approve of it, and he had brought the girl over to me. I told him the girl was too old for him. I said, "Now you are going to get into trouble. You should stay here so I can keep watch over you". So he said, "Well, I think she is a nice person." I said, "Well, what you think is nothing."

Q. Now, in this period of time meaning shortly after he [fol. 226] came back from the penitentiary, did you try to get any help for him, Mrs. Peterson?

A. Yes. I went to 48th Street station and took out a warrant and I told them what I wanted with him. I told him that my son seemed to have a disturbed mind with things he was doing, he is not normal, and I wish you would help me to pick him up so I can have him put away. I signed this warrant and went back to find out why they hadn't picked him up because the way he was fighting around in the streets, people were beating him up. He looked unmerciful.

Q. How many warrants have you issued for the arrest of your son?

A. I took out one and went back to see about why they hadn't picked him up and he said, well, they had more warrants than mine, I had to wait.

Q. When was this warrant that you are referring to issued?

A. Well, when he jumped on a brother-in-law of mine, he beat him up terrible.

Q. About what month was that?

A. Well, I disremember but I think it was in the summertime in '57 or either '58, I disremember.

[fol. 227] Q. Did you have a warrant issued just prior—

A. Yes.

Q. —during the month of February, 1959?

A. I don't think it was in February. No, I didn't have a warrant in February, I don't think. The police come to my house in February of '59. I didn't issue a warrant.

Q. Would you describe at this time how your son appeared the times when he did not seem as you say to be normal?

A. Well, he would look starey-eyed and he would put his hands in his pockets and pace the floor.

Q. Was there anything unusual about his speech?

A. Well, he didn't seem to talk and when he would say something, he didn't say too much to me.

Q. Would he be sad or would he be happy or—

A. No, he was sad and he would just stare and look and I wanted to know from him what was he worried about, what was happening and he still wouldn't tell me. He would just have a glare in his eyes.

Q. Now, Mrs. Peterson, based on your observation of your son and based on what you have mentioned here, do you have an opinion as to whether or not your son is sane or insane?

[fol. 228] Mr. Conley: Objection.

The Court: Overruled.

By Mr. McDermid:

Q. Do you have an opinion?

A. I think he is insane. There is evidently something definitely talking back or something has happened because he has never did that before. In fact, it doesn't run in the family, of insanity, but there is something definitely wrong with him.

Q. Do you have an opinion as to whether or not he knows the difference between right and wrong?

A. No.

Q. You don't have an opinion on it?

A. I don't think he knows the difference between right and wrong. I think he thinks whatever he does is right.

Mr. McDermid: That's all, Mrs. Peterson.

Mr. Conley: Just a minute, Mrs. Peterson.

Cross examination.

By Mr. Conley:

Q. Could you tell us when Theodore started drinking heavily?

A. After he come back out of service.

Q. And on these times that you have talked about after he came out of service, when he acted strangely, was he [fol. 229] drinking at those times?

A. Sometimes he would be drinking and sometimes he wouldn't.

Q. And you discussed your testimony with Mr. McDermid here before you testified, is that right?

A. Well, yes, I talked with him.

Q. And you would like to help Theodore if you can, wouldn't you?

A. Yes. He is my son, yes.

Mr. Conley: I have no further questions.

The Court: Call your next witness.

(Witness excused.)

Mr. McDermid: Helen Calhoun.

The Bailiff: Miss Calhoun is not back there.

Mr. McDermid: Alice Moore then.

This witness has been sworn as of yesterday.

The Court: Were you sworn, lady?

The Witness: Yes.

The Court: Be seated, please.

[fol. 230] ALICE MOORE, a witness called on behalf of the Defendant, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McDermid:

Q. Would you state your name, please?

A. Alice Moore.

Q. And your address?

A. 5532 Ingleside.

Q. What is your relationship to the defendant Theodore Robinson?

A. None.

Q. How did—on what occasion did you get to know Theodore Robinson?

A. Through his mother and sister. I sew for them.

Q. Approximately how long have you known Theodore Robinson?

A. Well, since he is about ten or twelve years old.

Q. At that age, would you describe his behavior at that age?

A. He was a very quiet boy.

Q. Did he have any illness that you know of that was [fol. 231] noteworthy?

A. No, not that I know of. He just was quiet, just a very quiet boy; unusual.

Q. When did you first notice any remarkable behavior, different behavior about him?

The Court: She hasn't said that she has.

Mr. McDermid: Thank you.

Q. Have you ever observed any unusual behavior about Theodore Robinson?

A. Yes.

Q. When was the first time that you observed any of it?

A. When he came back on furlough from the Army.

Q. Where were you at this time?

A. Where was I living?

Q. Yes, where were you living?

A. I was at 611 East 42nd Street at this time.

Q. Did you see him at this time; where?

A. At this address.

Q. What was the occasion for your seeing him?

A. He just came to visit me to say hello.

Q. What was the unusual behavior that occurred at this time?

A. Well, when he was talking or he was saying some-[fol. 232] thing, he would laugh, you know, laugh so much, and he didn't do that, and I just wondered why, what he was laughing about; about everything was so funny.

Q. What other behavior did you notice about him around this time?

A. Well, nothing so particularly.

Q. Do you remember him doing anything which was unusual?

A. No. When I say anything, he just get tickled.

The Court: Get what?

The Witness: Tickled. Laugh a whole lot.

By Mr. McDermid:

Q. Did you around about this time, meaning about the time he returned from the Army on a furlough, were you called to his home?

A. Not at this particular time. After he came home from the Army, I was called to his home.

Q. What occurred at that time?

A. He had went off on some kind of rage or something.

Q. I would prefer that you would tell us. Answer the question more directly. When did you first see him at this time?

A. When he did this at his home?

[fol. 233] Q. Yes.

A. When his mother called me. That is when you mean?

Q. Yes. And what did you do then?

A. She called me to come over and talk to him, seemed he was in a rage and she couldn't do anything with him.

Q. What did you do?

A. I went over to the house.

Q. And what did you observe at that time?

A. Well, he had kicked a hole in the bar like, you know, a little bar she had there.

Q. Did you see Theodore Robinson at that time?

A. I did.

Q. Did you notice anything unusual about him?

A. Very much.

Q. Would you describe his behavior at that time?

A. Well, his mother asked me to see if I could talk to him and get any sense from him and I went to him to talk to him and he was sitting with his head down staring at the floor like this (indicating) and when I would talk to him, he didn't give me no answer and when he did raise his head to look at me, he looked at me and just like this, [fol. 234] glassy eye, and I said, "What is wrong?" and he didn't say anything and then he just stared, just stare in space just like that, but he wouldn't talk to me.

Q. How long did he sit there?

A. I sat with him about twenty-five or thirty minutes.

Q. Where was his mother at this time?

A. Well, she was in and out. I told her to go up in the front and let me talk to him by myself.

Q. Did he talk to you at all?

A. No, he wouldn't talk to me. I couldn't get anything out of him.

Q. And then finally what occurred?

A. I went home. I told her I couldn't do anything with him. "There is something. I don't know, but I am going home. I don't have any more time."

Q. Do you remember any other unusual circumstance? Do you remember any other unusual behavior by Theodore Robinson after that?

A. No. I wasn't around him for anything else.

Q. And have you seen him in the last year?

A. Not to say anything to him.

Q. Now, based on the incidents that you have stated here in the court, do you have an opinion as to whether Theo- [fol. 235] dore Robinson is sane or insane? Do you have an opinion?

A. When he is in those moods, I think he is insane; when he is in those moods, because he is terrible.

Q. Do you have an opinion as to whether or not he is sane or insane?

A. Yes.

Q. First of all, tell me if you have an opinion. Do you have an opinion as to whether—strike that, please.

Do you have an opinion as to whether or not he knows the difference between right or wrong?

A. When he is in those moods, no.

Q. First of all, do you have an opinion as to whether he is—he knows the difference between right or wrong? Yes or no; do you have an opinion?

A. No.

Mr. McDermid: I think that will be all, and I think the record will state as to that.

The Court: Cross examine. Any cross examination?

Mr. Conley: Yes, sir.

[fol. 236] Cross examination.

By Mr. Conley:

Q. This bar that you refer to, Ma'am, what kind of a bar is it? The one I know is to work with.

A. A table bar you use to serve.

Q. To serve what?

A. Oh, when you have company or anything, she keeps the glasses and things she has in there, that we have in the dining room.

Q. Were there any intoxicating beverages on the bar?

A. No, there wasn't.

Q. Did you ever see any intoxicating beverages on that bar?

A. No, I didn't.

Mr. Conley: I have no further questions.

The Court: Next witness, please.

(Witness excused.)

Mr. McDermid: Mr. Bailiff, tell me when Mrs. Helen Calhoun arrives.

Mr. William Langham, the older gentleman.

I have one witness to call.

The Court: All right, proceed.

[fol. 237] WILLIAM HENRY LANGHAM, a witness called on behalf of the Defendant, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McDermid:

Q. State your name?

A. William Henry Langham.

Q. Where do you live?

A. 7528 South Eggleston.

Q. What is your relationship to Theodore Robinson?

A. I am the grandfather.

Q. How long have you known Theodore Robinson?

A. Well, I have known him since he was about seven or eight months old.

Q. Would you describe the behavior of your grandson when he was a young boy?

A. When he was a young boy, he was fair, he was all right. Nothing wrong with him in his young days.

Q. When did you first observe any change in his behavior?

A. Well, I noticed him. In fact, ever since he had come from the Army, he hadn't been right, been active for some [fol. 238] time. He tells me this is all right, and he acted like he wasn't really normal.

Q. Would you remember a particular circumstance, a particular time when he acted unusual?

A. Well, I noticed—you see, I do a little outside work which is painting and I would have him to come and help me going on late because I had a high blood pressure and had got him to help out, especially to paint the ceilings because it is up. I noticed that he would be working and all at once, he would come down there and walk on out and never say where he is going and whatnot and he would be out two or three hours, and at times he would be in a daze and when he comes out, he comes back just as fresh. He just says he didn't do anything. I noticed that he wasn't at all himself.

Q. Did you notice any other behavior?

A. The next behavior is that he was living in one room of my house and they went out one night, him and his wife. And he come back where I was sleeping when he came back and it seemed like they began a ruckus and fighting back there in the room and he got too hot for her and she ran out and she come up there in the room where me and my wife was.

[fol. 239] Q. Proceed. I am sorry.

A. He trailed her up there and wanted to continue to quibble and I told her to go in the room where my wife was and lay down with her and for him to go back in his room, to try to quiet him down, but he wouldn't accept that. He tried to kick the door in and then went out of the room, he went and got her clothes and threw them out in the yard and he was going to set them on fire and he got so unruly, I had called the law, 48th Street station, to lock him up there and settle the matter.

Q. Did you mention clothing?

A. He said he was going to burn the clothing, burn her clothing up, and the law came and warned him if he would do it again, they would come and lock him up.

Q. Do you recall an earlier incident in his life when he was a younger boy that was unusual?

A. Well, he was normal until he went to the Army and went back. After he comes from the Army, he never been real good since.

Q. When was the last time you saw Theodore Parker—Theodore Robinson in the year 1958?

A. In the year 1958? Why, that date, I couldn't tell, but [fol. 240] something like a week or so I saw him.

Q. How often would you see him during the course of the year?

A. I would never see him, only when he happened to drop by the house and I didn't never visit his home, and at times he would be normal and again he would be acting like he didn't know what he was doing.

Q. Did you see him in the month of January?

A. In the month of January?

Q. Of this year, just prior to this shooting?

A. I saw him three or four days before it was said he committed a crime, before that. I haven't seen him since.

Q. Do you remember anything unusual occurring at that time?

A. Oh, nothing unusual, just always giddy, carrying on a little fun but he haven't got a good, regular mind since he come from the Army.

Q. Based on your observation of Theodore Parker—

A. Robinson.

Q. Theodore Robinson, excuse me, do you have an opinion at this time as to the sanity of your grandson?

Mr. Conley: Objection, your Honor.
[fol. 241] The Court: He may answer.

The Witness: I would feel that he is partly insane all the time. I didn't feel he was normal and I have talked

with him over the matter and tried to get him straightened out and I couldn't do nothing.

By Mr. McDermid:

Q. First of all, Mr. Langham, would you just answer yes or no. Do you have an opinion? Do you have an opinion, yes or no, as to whether or not he is sane? Do you have an opinion, first of all?

A. My opinion, Officer, is that he was insane.

Q. Do you have an opinion as to whether or not he knew the difference between right and wrong? First of all, answer me yes or no as to whether or not you have an opinion. Do you have an opinion?

A. That he was insane? I have an opinion.

Q. Yes.

A. He was insane.

Q. First of all—no, do you have an opinion as to whether or not he knew the difference between right and wrong?

A. I feel he didn't know the difference at times.

Mr. McDermid: I think that will be all, and thank you [fol. 242] again.

Mr. Conley: No cross.

The Court: Next witness.

COLLOQUY BETWEEN COURT AND COUNSEL

(Witness excused.)

Mr. McDermid: Is Helen Calhoun here?

The Bailiff: Not yet, counsel.

Mr. McDermid: Mr. Leroy Austin.

Your Honor, I see that it is 12:15 and it was my understanding that yesterday the Court ordered Helen Calhoun, one of the witnesses in this matter, to be present at 11:30. I do know that she was ill at the time and you really granted her special privilege to arrive late and to have her prompt testimony. She has not appeared and I do think

that she is very important. I would like the matter to be continued until lunch time is passed and hope that I can—

The Court: Call your next witness while we are waiting for her.

Mr. McDermid: Let me confer with my fellow counsel if I may.

Your Honor, at this time I do not have a witness to call. I do hope that I will be able to get Helen Calhoun immediately after lunch.

[fol. 243] The Court: Who will follow her?

Mr. McDermid: May I be excused again?

Mr. Carey: We have one witness by stipulation with the State's Attorney whose testimony will go in by stipulation.

The Court: Who is that?

Mr. Carey: That would be a John Dorgan.

The Court: Stipulation of John Dorgan, what would he testify to?

Mr. Carey: That we have to get from your Honor through your notes of a prior trial.

The Court: Get that book, Mr. Bailiff.

Mr. McDermid: Your Honor, there is also a doctor from the Psychiatric Institute that we have been trying to get in contact with, and we do feel that we can certainly reach him by the morning. We had hopes of reaching him and having him in here this afternoon.

The Court: When did you try to reach him? (Handing book to Mr. Carey.)

Mr. McDermid: Back prior to July, we wrote and received a letter from the Institute in July, and had conversations at that time.

The Court: The Institute of Illinois?

[fol. 244] Mr. McDermid: Yes. It is down at 11th and State Street.

The Court: Did you subpoena him?

The Bailiff: The witness Helen Calhoun is here now, Judge.

The Court: Did you subpoena him?

Mr. McDermid: I understand it was done but I am not really sure.

The Court: If you subpoenaed him, I will issue an attachment. If you did not subpoena him, we cannot delay the trial. You must prepare your lawsuit before you go to trial, not during the trial. You are on trial now for two days. Other cases are waiting. We have to proceed. If you subpoenaed him, prepare a petition and I will send for him. If you did not subpoena him, it is unfortunate.

Are you ready with your stipulation?

Mr. Carey: It wasn't John Dorgan. It was Theodore Davis, an officer of the Park District.

Mr. Conley: We will stipulate, Judge.

The Court: To what?

STIPULATION AS TO TESTIMONY OF THEODORE DAVIS

Mr. Carey: Let the record show that by agreement between the attorney for the defense and the Assistant State's Attorney, the State's Attorney through the As-[fol. 245] sistant State's Attorney, Robert Conley, that if Theodore Davis, an officer, was called, that he would testify that he is assigned to the Park District and that at 7:40 p. m. on the 10th day of March, 1953, that the defendant came into the South Park station and told him that he wanted to confess a crime.

Mr. Conley: May I interrupt just one minute? Your Honor, we would object to this officer being called as a witness. However, if he were allowed to testify as a witness to these matters, we would stipulate that he would testify to this effect.

The Court: Very well.

Mr. Carey: That he was separated from his wife and attempted to commit suicide by jumping into the lagoon. The defendant was taken to the hospital and when he removed his hat, there was evidence that the defendant had shot himself in the head. (Returning book to the Court)

The Court: Is that all?

Mr. Conley: I would object, Judge, to the evidence that the defendant had shot himself in the head. He would testify that the defendant had a head wound.

Mr. Carey: All right, a bullet wound of the head.

[fol. 246] The Court: All right. Call your next witness. I understand that the lady is here now, Helen Calhoun. Helen Calhoun is here. Let's move along a little faster, please.

Raise your right hand, please, and be sworn.

HELEN CALHOUN, a witness called on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. McDermid:

Q. Will you please give your name?

A. Helen Calhoun.

Q. Spell your last name?

A. C-a-l-h-o-u-n.

Q. What is your address?

A. 70 East 49th Street.

Q. Will you please sit up and face me. I think we can have a little better contact and we will all be able to hear.

What is your relationship to Theodore Robinson?

[fol. 247] A. That's my nephew.

Q. And when did you first see Theodore Robinson as a human being?

A. I went and got the doctor when he was born.

Q. Do you remember the year of his birth?

A. No, no, I don't.

Q. Where were you living at the time?

A. 521 East 50th Street, 521 East 50th Street.

Q. Where was his mother living at that time?

A. 521 East 50th Street.

Q. And did you see Theodore Robinson after he was born and as a child?

A. Yes, I did. Yes.

Q. Would you describe his behavior?

A. As a child, he was a normal baby. He went to school, went to Sunday school, went to church with my son. We had no trouble whatever with him.

Q. When did you first observe anything unusual? Have you ever experienced anything unusual about Theodore Robinson? First answer yes or no.

A. Yes.

Q. When did you first observe anything unusual about Theodore Robinson?

A. Well, one reason—one time when he had the accident [fol. 248] with the baby, and before that he came to my house one morning and I was washing the windows, blinds, on a ladder. And he told me someone was trying to kill him, and he was pacing the floor and starey-eyed and I just kept trying to calm him down by talking with him and trying to pray with him. I didn't, so I did get a person to call his mother and then he asked me himself to call the police and I did.

Q. Approximately what year was this?

A. I don't recall really the number—the year, sir. It's the day, the same day that we took him to the hospital at Vaughns, and then they transferred him from there back to Cook County to the Psychopathic Hospital, so you have those dates.

Q. Turning your attention again to this first unusual behavior that you observed, you don't recall the year?

A. No, I don't.

Q. Do you remember what season of the year it was?

A. No.

Q. Was Theodore Robinson living at your home at that time?

A. No. He came there early in the morning.

[fol. 249] Q. What were you doing?

A. Washing the windows and blinds in my kitchen.

Q. Would you tell us then, did he—how did he enter the apartment?

A. Well, he rung the bell and I went to the door and when he came in, he told me to close it, that someone was trying to kill him, and I said, "What?" And he was talking, you know, unusual, and so I just passed it off and went back to the kitchen and started to washing my blinds over again and he said, "Will you get down from the window because they are going to kill you too." I said, "Nobody is going to kill either one of us." And he in the meantime is pacing the floor so he reached to pull me down off the ladder because he was trying to protect me, I guess, if someone was trying to kill.

Q. What did you do then?

A. Then I got down and I went and called his mother and about a half hour or so, she got there and in the meantime he is telling me to call the police so I called the police. He wouldn't let me let anyone else in but his mother and the police. So when the police came, he told us that he couldn't take us to the hospital but he would [fol. 250] carry us to the nearest cab stand which was 51st Street under the "L". I have forgotten the name of it but it was 51st under the "L". He put us in this cab and we went to Hines Hospital and in the meantime on our way out, he tried to jump out and we held him and the cab man was nervous and we were nervous, and we got him down there and they strapped him down in a wheelchair.

Q. Then what?

A. They brought him from there in an ambulance to the Psychopathic Hospital back of County.

Q. The County Hospital, in back. Do you know how long he stayed there?

A. No, I don't.

Q. Where did he go from there?

A. He went to Kankakee.

Q. Now, during this circumstance at your home, would you describe his face if you would? Was there anything unusual about his face?

A. His face, well, he was starey-eyed and walking and prancing. I mean he was just—he was just delirious.

Q. Do you remember anything unusual about his eyes? [fol. 251] A. Well, yes, but I mean I was as nervous as he was because I mean I knew that something was unusually wrong with him and it wasn't natural. I mean it wasn't the way that I was accustomed to seeing him.

Q. Did he recognize and know who you were, as far as you knew?

A. Well, he came to me. I don't remember him calling my name.

Q. From the County Hospital, where did he go, if you know?

A. To Kankakee.

Q. And do you know approximately how long he was there?

A. No, I don't, but I imagine, I guess the length of time they kept them. I don't know. I don't have no dealings with them.

Q. Did you see him shortly after he got out from the Kankakee hospital?

A. Well, not right away, no.

Q. When was the next time that you observed any unusual behavior about Theodore Robinson?

A. Well, I didn't see him too often. The next time I noticed as he came to my house again and at this time [fol. 252] he had a baby. He had his baby.

Q. Were you particularly close to Theodore? Could you describe your relationship as aunt? Was it a close relationship?

A. I should think so. He loved me and I loved him. Any time that I could help him, I was always willing to help him or anyone else.

Q. Now, turning again to the second time that he came to your house and displayed unusual behavior, would you tell us about that? This will be the last time, the second and last.

A. Judge, your Honor, that's in the record. Do I have to go through that?

The Court: Is that the instance when you were on the stepladder?

The Witness: No, sir, this is the incident of the baby and that is in the record.

Mr. McDermid: When the baby was shot.

The Court: Well, let him tell about it, and don't disturb her. He can tell it, can't he?

Mr. McDermid: He hasn't been able to as yet.

The Witness: I will do it.

Mr. McDermid: I have never really—

The Court: This lady is ill.

[fol. 253] The Witness: I will do it.

By Mr. McDermid:

Q. We would appreciate it. Do you remember approximately the year of this?

A. I think it was '53, I am not sure.

Q. Just tell me again if you would just what happened? Where were you at the time?

A. I was at home and this was on a Sunday night. He brought the baby to my home, and they stayed there the night, Sunday night and Monday. And at the time I had a tailor shop. And when I came home from work, I found the baby and I called the operator and asked her to give us—give me the fire department, the police or anybody that could assist me. And she kept the line open. She was very nice and she made all the calls that I wanted and the firemen were the first to get there.

Q. Excuse me.

A. We took him to the hospital.

Q. Would you have a drink? Have a drink if you would and get rid of that.

A. All right. Thank you.

Q. Now, would you proceed? But first answer this if you would; when you say you found the baby, how many

days—strike that. When he came over to the house with [fol. 254] the baby, do you remember what night of the week it was?

A. I am almost sure it was a Sunday.

Q. And do you remember why he came over?

The Court: She said they came over Sunday and why have it repeated. She is having a difficult time as it is.

Mr. McDermid: All right.

Q. When you say you found the baby, would you describe how you found the baby?

A. I stopped at a store. It was a little store there by me and on my way in, I brought in some milk. Not knowing that anything had happened and when I stuck the key in the door, I thought the baby had fallen because it was very active. Not knowing what, I just didn't go near. I just called the operator, and the operator sent me the ambulance, the fire ambulance, and we went to the hospital not knowing that the baby was shot. We didn't know that. They just picked the baby up and we went. When we got there, that was what we found out.

Q. How old was the baby at that time?

A. If I remember, he was approximately eighteen months [fol. 255] old.

Q. And did you see Theodore on that day after that?

A. The police brought him in while I was sitting in the hospital.

Q. While you were sitting in the hospital?

A. Well, the baby wasn't dead when we got him to the hospital.

Q. And did you observe him at that time?

A. No, no, no. You mean the baby?

A. No, Theodore?

The Court: Can we stipulate to this, Mr. State's Attorney?

Mr. Conley: Yes, Judge, we have no objection.

The Court: So stipulated that the defendant on the date she mentioned shot this child. Is that the idea?

Mr. McDermid: Well—

The Court: And that from that shot the child died. Is that what you are trying to prove?

Mr. McDermid: I am not proving that. That is a part of the circumstance but the more important thing is the surrounding of the incident which I am about to get to.

[fol. 256] The Court: All right, proceed.

By Mr. McDermid:

Q. Did you have an occasion to observe Theodore at that time?

A. Well, being nervous and upset, well, I mean I saw them bring him in. They were waiting on him.

Q. What was his condition at that time?

A. Well, I mean he still had that wild look but my mind wasn't on it.

Q. What was he doing at the hospital, if you know?

A. Well, he was injured himself. He shot himself in the head at the same time.

Q. Now, turning your attention to when he first came to your apartment on the Sunday night as you recall, do you remember anything about his behavior at that time that was unusual?

A. Well, he was not in any condition to care for the baby any farther and the reason I kept him is because I was sick myself but I didn't want him nor the baby to leave because I thought I could be of some assistance.

Q. And how did he behave? Did you talk to him, I take it, did you?

A. Surely.

Q. How did he talk?

[fol. 257] A. Well, again his behavior was still—I mean, he wasn't in any condition that he could care for the baby any more nor himself.

Q. Would you be more specific?

A. Well, I mean he was sick.

Q. How did he look? How did he stand?

A. Well, I mean he stood all right. He was just prancing. I mean, he was just nervous, just like anybody would be that's sick and just staring, wild.

Q. Did you understand him when he talked?

A. Not directly, no. I mean it wasn't plain in any way that you could understand him. I just figured he would stay and maybe I didn't know what it was, maybe he could sit down and settle himself. He might fall off to sleep but that he didn't do.

Q. Do you remember what he said?

A. No, he didn't want to stay there and he didn't want to leave the baby there but I managed to keep him.

Q. Did he say anything which indicated a lack of understanding of reality?

A. Well, he was upset, he and his wife, they were just upset and he was just upset.

[fol. 258] Q. Now, have you seen him since that time?

A. Seen whom?

Q. Theodore Robinson, since the time that the baby was shot?

A. Yes, I did.

Q. When was that?

A. He stayed in my home from November. The first time he had been to my house since this incident and he had been away.

Q. That was November of what year, if you recall?

A. '58—'57.

Q. How long did he reside with you at that time?

A. He stayed with me from November to around the middle of January.

Q. Did you have an opportunity to observe him over that period of time?

A. Yes, I did.

Q. Did you notice anything unusual in his behavior in that period?

A. Well, he was very nervous and I would walk into my room, and I was trying to keep him from knowing that I was afraid of him and upon doing so show him myself I didn't have any gun or anything in my house. I would sleep with anything under my bed, because I was [fol. 259] ascares of him myself but I still would bluff him that I wasn't.

The Court: Are you going to be with this witness much longer? We are well into the lunch hour.

Mr. McDermid: No, I won't be, your Honor.

The Court: All right, go ahead.

By Mr. McDermid:

Q. Now, based on your observation of Theodore Robinson and the incident with the baby and the incident in which you had to take him to the Hines Hospital, do you have an opinion as to whether or not he is sane or insane?

A. I think he is sick. He needs treatment. He is sick.

Q. First of all, would you tell me if you have an opinion?

A. Yes.

Q. What is that opinion?

A. He is sick.

Q. And what do you mean by sick?

A. Mentally ill, mentally sick.

Q. Do you have an opinion as to whether—would you answer using the words that I suggest? You said you had an opinion as to whether or not he was sane or insane. What is your opinion?

[fol. 260] A. He is insane.

Q. Do you have an opinion as to whether or not he knows the difference between right and wrong?

A. He is sick. No.

Q. Do you have an opinion, first of all?

A. Yes.

Q. What is that opinion?

A. That he doesn't know right from wrong.

Q. Do you have an opinion as to whether or not presently he is sane or insane?

A. He is sick. He is insane.

Q. First of all, do you have an opinion?

A. Yes.

Q. What is your opinion as to his present sanity? What is your opinion as to his present sanity?

A. He is mentally sick.

Mr. McDermid: That's all, your Honor.

The Court: Cross examine.

Mr. Conley: No cross.

(Witness excused.)

The Court: We will resume at 2:00 o'clock.

(Thereupon said cause was recessed until 2:00 o'clock p. m. of the same day, Wednesday, September 16, 1959.)

[fol. 261]

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

THEODORE ROBINSON

Indictment No. 59-793.

Before Judge Daniel A. Covelli.

Wednesday, September 16, 1959,
2:00 o'clock p. m.

Court met pursuant to recess.

Present:

Mr. Robert M. Conley, Assistant State's Attorney, on behalf of the People;

Mr. Warren J. Carey and Mr. Harold E. McDermid, on behalf of the Defendant.

STIPULATIONS AS TO TESTIMONY OF MAXINE BUTLER AND
DR. WILLIAM H. HAINES

The Clerk: Theodore Robinson.

The Court: Where are the defense lawyers?

A Bailiff: They are not out there. I looked in the hall for them.

Another Bailiff: They are not in the hall, your Honor.

Mr. McDermid: Your Honor, at this time the defense rests.

The Court: Defense rests. Put on your rebuttal.

Mr. Conley: Your Honor, before the defense rests, I would like to mention that we have a statement here from [fol. 262] one of the witnesses on the list that was furnished to the defense, one Maxine Butler. This is the one that I said couldn't be found, and in order to show that we are not trying to hide anything here, I would like to say that I showed Mr. Carey a copy of the statement and he read it and if there is any contention that there is anything in that statement that might be favorable to the defense, we would be glad that the statement itself be introduced in evidence in view of the fact that the woman can't be found.

Mr. Carey: Let me say this. I think I did read this. It seems to me like it is cumulative.

The Court: Statement of whom?

Mr. Conley: It is a—

Mr. Carey: Maxine Butler.

Mr. Conley: Maxine Butler.

Mr. McDermid: One of the witnesses that this morning that the defendant was interested in having in court.

Mr. Conley: We would like to have her in court ourselves but we couldn't find her.

The Court: As I understand it, you have given a copy of this to defense counsel and you are now offering to [fol. 263] stipulate to permit in evidence any part of the statement which the defense counsel wishes to put into evidence, is that correct?

Mr. Conley: Yes, Judge, although I think it would be more proper to put the entire statement in.

The Court: Well, you are offering to stipulate to the entire statement?

Mr. Conley: The entire statement.

The Court: You wish to see it?

Mr. Carey: At that time I read it hurriedly a couple of days ago without realizing that this might come up. In the event that I feel that there is something in here that we would like to put in, we can put it in then prior to a decision of this Court.

The Court: All right.

Mr. Carey: Let me read it then.

The Court: With that understanding, the defense rests. Is there any rebuttal?

Mr. Conley: Yes, Judge.

Mr. Carey: Yes.

Mr. Conley: It is stipulated then by and between the defendant and his counsel of record and the People of the State of Illinois through the State's Attorney of Cook [fol. 264] County that if Dr. William H. Haines, the Director of the Behavior Clinic of the Criminal Court of Cook County, were called to testify, he would testify that he has examined the defendant in this cause, Theodore Robinson, and that he first examined him in the month of May, 1953, and that he testified at a sanity hearing.

Mr. Carey: Judge, we stipulate only to his findings, not as to what he did. As I understand it, I am only stipulating as to his conclusion without—that he did examine him and that he found such and such.

The Court: Found such and such. All right.

Mr. Conley: There are two conclusions involved here, Judge. The defense brought out the fact that there was a certain proceeding in 1953, and I think that Dr. Haines would testify to the sanity hearing in 1953 at which time he made certain statements. In other words, there are two different examinations involved.

The Court: One in '53 and one recently, is that it?

Mr. Conley: Yes, sir.

Mr. Carey: We are only concerned with the one recently [fol. 265] and the report he made to the Court.

Mr. Conley: In view of the fact that the defense brought out the 1953 incident, I think we should be entitled to show the sanity as adjudicated in 1953.

Mr. Carey: I say this, that the record I think of this court indicates that the defendant was restored in 1953 in the Criminal Court Building. If that is what you want me to stipulate, I will stipulate to that.

Mr. Conley: I think it is a matter of record and possibly doesn't even need to be stipulated to.

The Court: Very well.

Mr. Carey: Well, he has been restored from the commitment to Kankakee in 1953.

Mr. Conley: Well, then it is stipulated that if Dr. Haines were to testify today, he would testify that he examined this defendant, rather he re-examined him in June of 1959, and he would testify that he subjected the defendant to certain tests, that in his opinion the defendant is sane.

Mr. Carey: No. I say I will stipulate to this, that his diagnosis was character disorder, he knows the nature of the charge and is able to cooperate with his counsel. That's his finding.

[fol. 266] Mr. Conley: Don't you agree, counsel, if we had him on the stand, that I would ask his opinion whether this man was sane or insane at the time he was examined?

Mr. Carey: Well, I can only stipulate to what we agreed here, and that is what I was going to stipulate to, his diagnosis.

Mr. Conley: Well, in order to save further delay, that would be the stipulation that Dr. Haines would testify that the defendant Theodore Robinson knows the nature of the charge pending against him—the charges, and is able to cooperate with his counsel in the defense of those charges.

The Court: Is it so stipulated, counsel?

Mr. Carey: Yes, Judge.

The Court: Very well.

Mr. Conley: Your Honor, Dr. Haines is not available now. I proceeded on the assumption after having talked to Mr. Carey that Dr. Haines' testimony to both matters would go in by stipulation. Now, the defense raised here is such that I think we should have Dr. Haines' testimony as to his opinion whether this man is sane or insane. It is possible that the man might be insane and know the nature [fol. 267] of the charge or be able to cooperate with his counsel. I think it should be in evidence, your Honor, that Dr. Haines' opinion is that this defendant was sane when he was examined.

The Court: Isn't it a fact that if Dr. Haines had found him insane, Dr. Haines would report that he could not cooperate with his counsel?

Mr. Conley: That is inferentially true and, therefore, I can't see why they should object.

The Court: You have enough in the record now. I don't think you need Dr. Haines.

Mr. McDermid: Could I ask if Dr. Haines has been under subpoena?

Mr. Conley: No, he is not. We didn't know what the nature of the defense would be until today.

The Court: Is that all?

Mr. Conley: That's all, Judge.

The Court: We will proceed with the argument. You wish to argue your case?

Mr. Conley: We will waive argument, Judge.

The Court: State waives argument.

ARGUMENT OF MR. McDERMID

Mr. McDermid: Your Honor, I should like to say that I think our defense is clear that we have presented at the present time. It is as to the sanity of the defendant at the [fol. 268] time of the crime and also as to the present time. In this case, which is a very serious case, the defendant has been able to cooperate with counsel with some reservations.

As shown by the record this morning, he has not understood all of the strategy that has been used, I am sure, and has generally been helpful. However, I do not feel that this present ability of lucidity bears on the issue of his sanity at the time of the crime and his sanity at the present time. I think the words sanity and insanity, the words are legal terms. I think that presently Mr. Theodore Robinson is in a lucid interval. I believe that from the witness stand you have heard testimony to indicate and prove that Mr. Theodore Robinson is presently insane.

Now, I know it isn't an easy matter to determine in our society what should be done with this type of an individual. Our modern psychiatrists, although making great advances in the ability to diagnose, are still lagging in their ability to cure and treat and, however, I think that this is an issue [fol. 269] and a problem really for them. I think that he

does need help, that he is sick, and I think that he should be kept off the streets, observed, treated and helped as much as possible, and I think that that can be done best by sending him to Chester. I think that he should be found not guilty and presently insane on the basis of the testimony that we have heard.

As to the real issue here, rather presuming that he is presently insane, I am just presuming it at this moment, although we do not have the best position or the best desirable methods of treating his condition, I think he still should be found not guilty, and I am sure you would agree if that was the determination of the Court.

I would like to say that one reason for such a close following of the law is that we do not know in the future what will occur in the medical field to take Theodore Robinson and make him a good citizen again. We do not know if this illness can be cured by a new chemical or new machine; something that we cannot predict.

Recently we are told that the Russians hit the moon. Roughly five years ago, I would not have predicted that I [fol. 270] would have been alive to hear such a thing and I think in a remarkably short time again, a drug or something may develop which would place Theodore Robinson back as a civilian back on the streets. At present, I can not say any more than my father could have predicted going to the moon, but I think there is some fear by society in general and I also have that fear that a person might go to an institution and because of the difficulty in determining mental illness a person would be again released to society. And yet if this is the problem and this is the place for him, I think that the officials of the institution should have this opportunity to hold him, observe him and work with him so that if later he is found sane and with assurance, that then he can be released. In the meantime, he is safely away from doing harm, as if your Honor would find him guilty and place him in the penitentiary.

I do think this is a difficult decision, but I think from the evidence that we have carried our burden in showing this issue, and that the State has failed to prove beyond a reasonable doubt that the defendant is sane.

[fol. 271]

ARGUMENT OF MR. CAREY

Mr. Carey: May I just read a few things for the Court's attention, Judge?

The Court: Yes.

Mr. Carey: I have before me a medical record from Kankakee State Hospital which has been introduced in evidence by stipulation, namely, Defendant's Exhibit 3. I would like to call to the Court's attention those things which I believe are important in this particular hospital record. To begin with, I have before me the Kankakee State Hospital report on the 12th day of June, 1952, in which there is a brief statement of the defendant's mental condition. It reads as follows:

"Was drinking and went to the Psychopathic Hospital. He imagined he heard voices, voices of men and women and he also saw things. He saw a little bit of everything. He saw animals, snakes and elephants and this lasted for about two days. He went to Hines. They sent him to the Psychopathic Hospital. The voices threatened him. He imagined someone was outside with a pistol aimed at him. He was very, very scared and he tried to call the police and his aunt then called [fol. 272] the police. He thought he was going to be harmed. And he says this all seems very foolish to him now. Patient is friendly and tries to cooperate."

It says this has taught him a lesson.

And also from the same report, on the 23rd day of June from the hospital which is a staff meeting record, it indicates that Dr. Cowan was the physician in charge of Theodore Robinson while he was in Kankakee.

"He went through an acute toxic episode from which he has some insight. He had been drinking heavily. I am wondering possibly he isn't schizophrenic. I think he has recovered from this condition. I have seen the wife and she is in a pathetic state. I have no objection to giving him a try."

And from further reading, meaning a try on the outside.
And also in the same medical report, it says:

[fol. 273] "The reason for admission: The patient was admitted to this hospital on the 5th day of June, 1952, from the Hines Hospital. Patient began presenting symptoms of mental illness about a year ago at which time he came to his mother's house. He requested money and when it was refused, he suddenly kicked a hole in her bar."

The Court: That is history.

Mr. Carey: Oh, this is from the history, sir.

The Court: Yes.

Mr. Carey: I think it is similar to what you had heard on the evidence today, so it was a problem back in 1952.

Those are the only things that I wanted to call to the Court's attention.

FINDING OF GUILT AND SENTENCE

The Court: Very well. All right, bring up the defendant, please.

The defendant is found guilty of the crime of murder. He is sentenced to the State Penitentiary for a term of his natural life. Take him away.

The Defendant: Judge, your Honor, may I say something [fol. 274] before you take me out of your courtroom?

The Court: Yes, sir.

The Defendant: As you know, I asked the Court about the witnesses that the State had that appeared—that appeared on the list. My lawyers had previously showed me the witnesses to that extent, and I have checked the list. I mean I see that the list is mostly police officers. Well, here the police introduced evidence of some clothes belonging to mine and I was told by the Court before going to trial, any time would be needed to subpoena witnesses, that it would be allowed, and the witnesses would be subpoenaed.

The Court: You have two eminent counsel. They have—

The Defendant: They must be incompetent or something, Judge, your Honor, still and all if they didn't have the

knowledge that they couldn't subpoena the witnesses.

The Court: The Court is satisfied beyond a reasonable doubt—

The Defendant: Still and all, may I still say something? [fol. 275] The Court: (Continuing) —that you killed this woman. Whether those were your clothes or not your clothes, it doesn't make any difference. Take him away. Call the next case.

You gentlemen did a fine job with what you had. You are lucky you saved his life.

Mr. Carey: There is another indictment pending against him.

The Court: How about the next indictment?

MOTION FOR NEW TRIAL AND IN ARREST OF JUDGMENT AND DENIAL THEREOF

Mr. Carey: Judge, just for the record, a motion for a new trial and a motion in arrest of judgment. We waive argument on both.

The Court: Motion for a new trial denied. Motion in arrest of judgment denied.

The Clerk: What was that?

The Court: Motion for a new trial denied, motion in arrest of judgment denied, and sentenced to life imprisonment.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Conley: It would be our motion to nolle Indictment 59-794.

The Court: Motion State, Indictment 59-794 nolle.

Mr. McDermid: At this time, your Honor—

Mr. Carey: Judge, I know that the Court is busy. Just a few things as to the statements made by the defendant; [fol. 276] at a later date if the record is produced, I would like the record to show that the defendant asked me to subpoena Mr. and Mrs. Moore, that I have talked to Mr. and Mrs. Moore. They can add nothing to this matter on trial and I showed Mr. Robinson what they told me

and at that time he said that he didn't wish them. This was after he had requested the Court for the subpoena.

The Court: The record will so show.

Mr. McDermid: I would like the record also to show, your Honor, that I personally have spent much time including perhaps two or three dozen telephone calls to psychiatrists; that I have contacted the Illinois Psychiatric Society and all of its officers requesting assistance in this matter. I have asked Dr. Arieff. His office is on Michigan Boulevard. I have not been able to get an analyst to cooperate and work on this matter, and I do not believe in subpoenaing a psychiatrist to testify when I do not know the degree of cooperativeness that he would display which would be helpful to the cause.

The Court: The record should show that the case was [fol. 277] properly prepared and presented by the two attorneys; that they did everything they could, and they are actually good trial lawyers and officers of the Court.

Call the next case.

Mr. Conley: Your Honor, should not the exhibits in the last case be impounded by the Clerk?

The Court: No.

Mr. Conley: At least some of them?

The Court: I don't think the Clerk has any place to keep them.

Mr. Conley: Small ones.

The Court: You had better take them yourself and preserve them in your own vault. They get down in the Clerk's office and you will never find them again. I suggest you preserve them in the State's Attorney's vault. I think you have a vault down there for that very purpose.

(Which was all the testimony offered and received in evidence and all the proceedings had in the trial of the above-entitled cause.)

[fol. 278] Reporter's certificate (omitted in printing).

[fol. 279]

JUDGE'S CERTIFICATE TO BILL OF EXCEPTIONS

And Forasmuch, Therefore, as the matters and things hereinabove set forth do not otherwise appear of record herein, the defendant tenders this, his Bill of Exceptions, and prays that the same may be signed and sealed by the Judge of this Court pursuant to the statute in such case made and provided;

Which, pursuant to the provisions of Supreme Court Rule 65-1, the Court being satisfied as to the accuracy of the transcript, and irrespective of the provisions of Rule 65 fixing the time for the presentation, certification and filing of reports of proceedings at trials, is accordingly done this 3 day of June, A.D. 1960.

Approved: /s/ D. A. COVELLI

Judge of the Superior Court of
Cook County, Ex-Officio Judge of
the Criminal Court of Cook
County, Illinois.

Approved:

/s/ ROBERT M. CONLEY
Assistant State's Attorney

Filed: Jun 3 1960, Sidney R. Olsen, Clerk of Criminal
[fol. 280] Clerk's Certificate (omitted in printing).
Court.

[fol. 281]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 14253 September Term, 1964 September Session, 1964

UNITED STATES ex rel. THEODORE ROBINSON,
Petitioner-Appellant,

v.

FRANK J. PATE, Warden, Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

OPINION—May 3, 1965

Before Schnackenberg, Knoch and Kiley, Circuit Judges.

KILEY, Circuit Judge. The district court denied, without hearing evidence, Robinson's petition under the Habeas Corpus Act, 28 U.S.C. §§2241-2254, to vacate his state conviction for murder and his life sentence. He has appealed, represented by counsel appointed by this court. We reverse and remand.

The district court in denying the petition relied upon the record and transcript of the murder trial without a jury in the Criminal Court of Cook County in 1959, and the opinion of the Supreme Court of Illinois in *People v. Robinson*, 22 Ill. 2d 162, 174 N.E.2d 820, *cert. denied* 368 U.S. 857 (1961).

Robinson's petition alleges that he was denied due process of law under the Fourteenth Amendment at his bench trial by the State's failure to prove beyond a reasonable [fol. 282] doubt his sanity at the time of the alleged murder, by the trial court's failure to conduct on its own motion a hearing into his competence to stand trial, and by the

court's denial of his Sixth Amendment right to compulsory process.¹

Robinson contends on this appeal that the district court erred in failing to require respondent to file a return to his petition, in refusing to appoint counsel for him, and in failing to hold an "evidentiary hearing" in accordance with the rules in *Townsend v. Sain*, 372 U.S. 293 (1962).

We recognize the severe pressure upon the state criminal trial courts to dispose of cases with dispatch in order to maintain a reasonable currency between indictment and trial. This salutary goal, however, must not be reached at the expense of constitutional rights. Robinson's trial was conducted under an undue preoccupation with hurried disposition in an atmosphere charged with haste, hardly consistent with the gravity of a capital case and protection of the right to due process.² One result of the unusual

¹Judges Schnackenberg and Knoch do not concur in that portion of this opinion, beginning at p. 8, dealing with the Sixth Amendment question. See the specially concurring opinion of Judge Schnackenberg, *infra*, p. 12, and the dissenting opinion of Judge Knoch, *infra*, p. 12.

²The following statements are taken from the transcript of the second day of the trial, commencing with the presentation of the case for the defendant late in the morning session. Number references are to the page in the transcript.

(207) The Court: Let's proceed, please. We have wasted fifteen minutes. We have thousands of indictments waiting for trial. I can't waste fifteen minutes waiting for defense counsel. Let's move.

(203) Mr. McDermid: May I have one minute to satisfy—

The Court: We have wasted eighteen minutes. You must prepare your lawsuit before you come to court. We have been on trial now for a whole day and a half and you have had ample time to talk to your client. Go ahead, talk to him now.

(209) The Defendant: I would like that the court be adjourned until tomorrow morning.

The Court: No, sir.

The Defendant: To give me time to confer with counsel for the calling of witnesses.

The Court: No, sir. We have been waiting here since 11:00 o'clock, waiting for your lawyer. It is now 11:30. We have been on trial a day and a half.

[fol. 283] haste was denial to Robinson, an indigent represented by court-appointed counsel and obviously without funds to pay for expert psychiatric testimony, of a fair opportunity to obtain volunteer expert testimony from a public agency. We shall consider this result later in the opinion.

The conviction by a state court of a person for an alleged crime committed while insane violates due process under the Fourteenth Amendment. *Smith v. Baldi*, 344 U.S. 561, 570 (1952) (Frankfurter, J., dissenting); *People v. Robinson*, 22 Ill. 2d 162, 174 N.E.2d 820 (1961). And while the State must prove the sanity of the defendant at the time of the alleged crime, that burden is satisfied in Illinois by the presumption of sanity until the introduction of evidence sufficient to raise a reasonable doubt of the defendant's sanity, at which time the necessity of affirmative proof of sanity beyond a reasonable doubt becomes the burden of the State. *People v. Skeoch*, 408 Ill. 276, 280, 96 N.E.2d 473 (1951); *People v. Patlak*, 363 Ill. 40, 1 N.E.2d 228 (1936).

(246) The Court: All right. Call your next witness. I understand that the lady is here now, Helen Calhoun. Helen Calhoun is here. Let's move along a little faster, please.

(259) The Court: Are you going to be with this witness much longer? We are well into the lunch hour.

(273) [immediately following the conclusion of the final argument for the defendant:]

The Court: Very well. All right, bring up the defendant, please.

The defendant is found guilty of the crime of murder. He is sentenced to the State Penitentiary for a term of his natural life. Take him away.

The Defendant: Judge, your Honor, may I say something before you take me out of your courtroom?

The Court: Yes, sir.

[The defendant then protested against failure of his counsel to call certain witnesses.]

The Court: The Court is satisfied beyond a reasonable doubt—

The Defendant: Still and all, may I still say something?

The Court: (Continuing) —that you killed this woman. Whether those were your clothes or not your clothes, it doesn't make any difference. Take him away. Call the next case.

Robinson's defense to the indictment was insanity at the time of the alleged murder. He contends that he was insane at the time of the trial also, or that at least there was a bona fide doubt of his sanity raised so that the trial judge on his own motion should have impanelled a jury and conducted a sanity hearing pursuant to the then 38 ILL. REV. STAT. §§592-593 (1963).³

Robinson did not testify. The defense presented four relatives and friends as lay witnesses and the stipulated [fol. 284] testimony of a police officer on the question of his sanity. Each witness stated his opinion that Robinson was insane and did not know the difference between right and wrong.

The testimony showed a continuing history of erratic and violent behavior by Robinson from the time he was struck on the head by a falling brick as a child until the unusual circumstances of the fatal shooting and his arrest. Incidents related included a commitment for a short time to a state mental hospital in 1951, from which he was released at his wife's request, the killing of his eighteen month old baby⁴ and his contemporaneous attempted suicide, an attempt to burn his wife's clothes, and his mother's attempts to have him recommitted within a year before the alleged murder.

Robinson's behavior in the shooting and his subsequent arrest was also erratic. Flossie Mae Ward, the victim, a woman with whom Robinson had been living, worked at the restaurant where the shooting occurred. Robinson entered the restaurant carrying a gun which he pointed at Mrs. Ward, within a distance of five feet or less, without saying a word. Upon seeing him she said, "Ted, don't start nothing tonight," and went back to her work. Robinson then moved quickly to the back of the room, a distance of twenty feet or more, and jumped over the counter;

³ *People v. Burson*, 11 Ill. 2d 360, 368, 370, 143 N.E.2d 239 (1957); *Brown v. People*, 8 Ill. 2d 540, 134 N.E.2d 760 (1956).

⁴ This incident occurred in 1953. The record is unclear on this point, but it appears that Robinson served a sentence of only three years after being convicted of shooting the baby.

as a result, two other employees were placed between him and Mrs. Ward. He rushed past them and fired one or more shots at the victim. Both Robinson and Mrs. Ward then jumped over the counter and ran out the door onto the sidewalk, where her body was found.

The evening following the shooting, Robert Moore told the police that Robinson was at Moore's apartment. When officers in uniform arrived on the floor of the apartment, Robinson was standing in the hall near the elevator. The officers went by him, talked to Mr. and Mrs. Moore in Robinson's view, with guns drawn, and being informed that Robinson had just left, went back down the hall and asked Robinson to identify himself. He did. Robinson had remained where he was, even though he could have entered the elevator without passing the policemen while they talked to the Moores.

[fol. 285] The shooting occurred, and the trial was held, in 1959. The State introduced the record of Robinson's discharge from a mental hospital in 1951, a stipulation of an adjudication in 1953 that he was sane, and a stipulation that the director of the court's Behavior Clinic would, if called, testify, on the basis of an examination two months before trial, that Robinson was able then to understand the charge against him and to cooperate with his counsel.

The morning of the second day of the trial the court was told by Robinson's attorney that they had hoped to have a doctor from the Psychiatric Institute testify that afternoon but had been unable to reach him. He said they were sure the doctor could be called the next morning, but the court, when no assurance was given that the doctor had been subpoenaed, refused to continue the case until the next morning in order to hear the doctor's testimony.⁵ The trial concluded that afternoon without the

⁵ The Court: Did you subpoena him?

Mr. McDermid: I understand that it was done but I am not really sure.

The Court: If you subpoenaed him, I will issue an attachment. If you did not subpoena him, we cannot delay the trial. You must prepare your lawsuit before you go to trial. You are on trial now for two days. Other cases are waiting. We have to proceed. If you subpoenaed him, prepare a petition and I will send for him. If you did not subpoena him it is unfortunate.

doctor's testimony and without an expert witness called for or against Robinson.

After the verdict and sentence to life imprisonment, one of Robinson's attorneys stated that he had made two or three dozen calls to psychiatrists, that he had contacted the Illinois Psychiatric Society and its officers, and that he had asked a private psychiatrist for assistance—all to no avail. He stated that he did not believe in subpoenaing a psychiatrist to testify when he did not know if the particular doctor would be cooperative.

The trial court made no express finding that Robinson was sane at the time of the alleged murder, but that finding is implicit in the judgment of guilt. The Illinois Supreme Court on appeal held, however, that the evidence at the trial failed to raise a reasonable doubt as to Robinson's sanity, since most of the incidents related by the witnesses occurred several years prior to the fatal shooting and there was no evidence that Robinson's mental illness was "of a permanent and continuing nature." *People v. Robinson*, 22 Ill. 2d 162, 169, 174 N.E.2d 820 (1961).

But that court, in its opinion, made no mention of the hasty trial of this capital charge with the denial of a reasonable opportunity to Robinson to obtain psychiatric testimony which could have had substantial bearing upon the very question of Robinson's "permanent and continuing" mental state. Presumably the Illinois Supreme Court saw little importance in the testimony of Robinson's mother of her unsuccessful attempts to have the police arrest her son so that he could be confined in 1958, or in the testimony concerning Robinson's eccentric behavior in committing the alleged murder. The mother's attempt to have Robinson committed the year before that homicide and his odd antics in the homicide were five and six years after the adjudication of sanity. Finally, although the Illinois Supreme Court did consider the claim of Robinson that he was denied the right to compulsory process to obtain as witnesses Mr. and Mrs. Moore, outside of whose apartment Robinson was arrested the day after the homicide, the court, among other things, stated that no showing had

been made that the witnesses sought were material. It could be that their observation of Robinson the day following the homicide was material to the question of his insanity the previous night.

We turn now to the question of Robinson's competency to stand trial.

Due process requires that a person be not convicted of a crime while he is insane. *People v. Robinson*, 22 Ill. 2d 162, 174 N.E.2d 820 (1961). And the denial of a reasonable request to obtain the services of a necessary psychiatric witness is effectually a suppression of evidence violating the fundamental right of due process. See *United States v. Ogilvie*, 334 F.2d 837, 843 (7th Cir. 1964). Neither Robinson nor his attorneys moved for an inquiry into defendant's sanity at the time of trial. In Illinois, however, the trial judge is required, whenever a bona fide doubt is raised as to the defendant's sanity at the time of the trial, to impanel a jury and conduct a sanity hearing. *People v. Lego*, — Ill. 2d —, 203 N.E.2d 875 (1965); *People v. Robinson*, p. 167. This procedure satisfies the requirement of due process; to deny the established procedure to a particular accused, however, is a denial of due process. *Thomas v. Cunningham*, 313 F.2d 934, 938 (4th Cir. 1963).

As we have indicated, Robinson did not testify in his behalf, and the testimony with respect to his sanity came from relatives and friends. The opinion of these witnesses was that Robinson did not know the difference between right and wrong. We have discussed at length their testimony hereinabove. The only evidence introduced for the prosecution specifically on the question of Robinson's competency to stand trial was a stipulation at the end of Robinson's case that if called, Dr. Haines, the director of the Behavior Clinic of the Criminal Court of Cook County, would testify that he examined Robinson about two months prior to trial and that in his opinion Robinson was at that time able to understand the nature of the charges against him and to cooperate with counsel. The Assistant State's Attorney sought a broader stipulation from defense counsel. Failing in this, he told the court,

Now the defense raised here is such that I think we should have Dr. Haines' testimony as to his opinion whether this man is sane or insane. It is possible that the man might be insane and know the nature of the charge or be able to cooperate with his counsel. I think it should be in evidence, your honor, that Dr. Haines' opinion is this defendant was sane when he was examined.

The trial court stated that the doctor's testimony was not needed, since there was already enough in the record.

There was no express finding by the trial court that defendant was competent to stand trial. There is only our inference, of that finding, drawable from the judgment of guilt and from the trial court's statement referring to the State's Attorney's suggestion that the director of the Behavior Clinic should be called as a witness, that "You have enough in the record now. I don't think you need Dr. Haines."

Denial of a reasonable opportunity to obtain psychiatric testimony for Robinson could also have weighed heavily on the question of his competency to stand trial. The case closed with no psychiatric witness called to give testimony [fol. 288] either on the defense of insanity or on Robinson's competence to stand trial. We have pointed out that denial of a fair opportunity to obtain necessary testimony is effectually to suppress it. See *United States v. Ogilvie*, 334 F.2d 837, 843 (7th Cir. 1964). The Illinois Supreme Court thought no facts were brought to the trial court's attention to raise a doubt of defendant's sanity requiring an inquiry; that the "traits, conduct and crimes" of Robinson were not proved to be "true manifestations of insanity"; that the conclusions of the defense witnesses were based on incidents many years before the trial, having little relevancy at the time of trial; that the court was aware of Robinson's confinement eight years earlier, and of the records of his condition and discharge and of his adjudication of sanity six years before the trial; and that the court had before it the stipulation concerning Dr. Haines, the director of the Behavior Clinic, as well as

Robinson's display at the trial of his ability to rationally assist in the conduct of his defense.

We point out again that the only likely means Robinson had to prove that his "traits, conduct and crimes" were "true manifestations" of insanity was the psychiatric testimony he was denied a reasonable opportunity to obtain; and again we note his mother's testimony of her unsuccessful attempt in 1958 to have the police arrest her son for confinement because of his irrational conduct at the time and the testimony of his erratic conduct in committing the homicide, both of which events occurred after the adjudication of sanity.

We are mindful of the admonitions to district courts in *Townsend v. Sain*, 372 U.S. at 318, with respect to "their delicate role in the maintenance of proper federal-state relations." But the district court is reminded in *Townsend* of its power to "try the facts anew," 372 U.S. at 312, where an applicant in habeas alleges facts which, if proved, would entitle him to relief, and of the duty to exercise that power in a federal evidentiary hearing "unless the state court trier of facts has, after a full hearing, reliably found the relevant facts." 372 U.S. at 313.

Robinson's petition, and the record, present a substantial question of denial of his Sixth Amendment right to compulsory process^o for witnesses in his behalf. At the [fol. 289] commencement of the defendant's case Robinson protested that his attorneys had failed to subpoena two witnesses as he had instructed them. One of the attorneys stated to the court that he did not remember any such instruction. When Robinson was asked what the witnesses would testify to he replied that he did not know, but that he wanted them subpoenaed. The court stated that "We can't subpoena people unless you tell us what they are going to testify to."

The witnesses Robinson wanted called were Mr. and Mrs. Robert Moore. Prior testimony had disclosed that

^o U.S. Const. amend. VI.

"In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor"

Robinson was present in their apartment the day after the shooting and that they had caused, and witnessed, his arrest. Hearsay testimony of their statements at the time of the arrest had been admitted into evidence without objection.

Following the announcement of the verdict and sentence, one of Robinson's attorneys stated that following Robinson's request during the trial for subpoenas he had talked to the Moores and determined that their testimony would not be helpful. He stated that Robinson was told of this and agreed that they should not be called.

In the wake of *Gideon v. Wainwright*, 372 U.S. 335 (1963), holding that the Sixth Amendment right to counsel is embraced in the Fourteenth Amendment to protect that right against state action,⁷ it follows that the right of compulsory process must similarly be included in the Fourteenth Amendment protection.⁸ This right is as "implicit [fol. 290] in the concept of ordered liberty"⁹ as the right to counsel. In many cases unless a defendant had the opportunity to compel witnesses to appear in his behalf, the right to counsel would be meaningless. Unreasonable denial of a continuance to afford the defendant a timely opportunity to obtain witnesses by compulsory process was held to be a violation of this constitutional right in *Paoni v. United States*, 281 Fed. 801 (3rd Cir. 1922). And this basic

⁷ Since this opinion was submitted the Supreme Court has decided in *Pointer v. Texas*, 33 U.S.L. Week 4306 (April 5, 1965) that a defendant's Sixth Amendment right to be confronted with the witnesses against him, and to cross-examine them, is applicable to the states by virtue of the Fourteenth Amendment. ("We hold today that the Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment.") There is good reason to anticipate that before long the right to compulsory process for obtaining witnesses in his favor will likewise be made applicable to the states by the Supreme Court.

⁸ See *MacKenna v. Ellis*, 263 F.2d 35 (5th Cir.), cert. denied 360 U.S. 935 (1959); *MacKenna v. Ellis*, 280 F.2d 592 (5th Cir. 1960), modified on rehearing en banc 289 F.2d 928 (5th Cir.), cert. denied 368 U.S. 877 (1961).

⁹ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

right to process can be understandingly waived only by a defendant, not by his attorney. Cf. *Fay v. Noia*, 372 U.S. 391, 439 (1963).

If, as alleged by Robinson, he immediately upon learning that his attorneys had failed to subpoena Mr. and Mrs. Moore as he had instructed them, requested that they be subpoenaed, and if he did not later understandingly abandon his desire to have them called, then his constitutional right was violated. It was not necessary for him, as the state court seems to have thought, as a prerequisite to the exercise of this right to be able to tell the court what testimony he expected from the witnesses. Without any specification by Robinson, the relationship of the Moores to the case should have been apparent from the testimony concerning Robinson's arrest. They saw Robinson the day after the homicide and could have given testimony of their observation of him, on the question of his insanity at the time.

A review of the record of the state trial persuades us that Robinson was convicted of murder and sentenced to life imprisonment in an unduly hurried trial without a fair opportunity to obtain necessary expert psychiatric testimony in his behalf, without sufficient development of facts on the issues of insanity at the time of the homicide and at the trial, and upon a record which does not show that the state court "after a full hearing reliably found the relevant facts."

We think our consideration and disposition of the foregoing questions compel the conclusion that the district court erred in not requiring a return to be filed by respondent to Robinson's petition. Under the mandatory [fol. 291] provisions of 28 U. S. C. § 2243¹⁰ a return is required unless the petition is patently frivolous or obviously without merit. *Brooke v. Anderson*, 317 F.2d 179 (D.C. Cir. 1963); *Higgins v. Steele*, 195 F.2d 366 (8th Cir. 1952).

¹⁰ "A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto."

We hold that an evidentiary hearing was mandatory. The cause will be remanded for that purpose.

The cause is remanded to the district court with directions to appoint counsel for Robinson; to require the respondent to file a return; to proceed with a determination of the question whether, when Robinson committed the alleged murder in 1959, he was sane; and to provide a fair opportunity for appointed counsel—with whatever aid the district court can provide him—to obtain expert witnesses to testify on the question. If Robinson is found by the court to have been insane at the time in question he should be ordered released from custody of the respondent; such release should, however, be delayed for a reasonable time to be set by the district court for an opportunity by the appropriate State authorities to examine into Robinson's present mental health.

The district court should also determine upon the hearing whether Robinson was denied due process by reason of failure of the trial court on its own motion to impanel a jury and conduct a sanity hearing upon his competence to stand trial. If the court finds that Robinson's federal constitutional rights were violated in that respect, he should be ordered released, but such release may be delayed for a reasonable time to be set by the district court to permit the State of Illinois to grant Robinson a new trial.

Mr. John C. Tucker, of Chicago, Illinois, was appointed by this court to represent petitioner on this appeal. We thank him for his able and devoted efforts on behalf of his client.

[fol. 292] SCHNACKENBERG, Circuit Judge, specially concurring.

I approve and concur in Judge Kiley's opinion, with the exception of that part dealing with Robinson's right to compulsory process for witnesses in his behalf, based on the Sixth Amendment. I believe that the supposed difference of opinion between Robinson and his attorneys as to whether these witnesses should be called or not, does not afford a basis for a charge of a violation of his constitutional rights.

KNOCH, Circuit Judge (dissenting). Regretfully, I find myself in disagreement with the opinion of the majority.

As the Illinois Supreme Court noted in its opinion on defendant's writ of error proceeding, neither defendant nor his counsel requested a sanity hearing. Granted that it was the duty of the Trial Judge to impanel a jury to determine the issue if the facts brought to the Court's attention or the personal observations of the Trial Judge raised a bona fide doubt of defendant's sanity. Here the Trial Judge, who was advised of the facts of the defendant's past medical history, had more than the usual opportunity to evaluate the defendant's demeanor in Court because of the several colloquys between the defendant and the Judge. Manifestly the Trial Judge experienced no bona fide doubt as to defendant's sanity. Lacking his unique advantages for such observation, it seems to me somewhat presumptuous for this Court, or the District Court, to say that he ought to have entertained such doubts.

As to denial of continuance to subpoena two additional witnesses, whom defendant's counsel had not seen fit to call, it seems only fair to me that the Trial Court be given some inkling of the nature of their anticipated testimony to justify the continuance sought mid trial.

[fol. 293] I would affirm the decision of the District Court. In my opinion the Illinois Supreme Court has adequately dealt with the issue raised here and its decision should not be disturbed.

[fol. 294]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES, ex rel, THEODORE ROBINSON,
Petitioner-Appellant,

No. 14253

vs.

FRANK J. PATE, Warden, Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

JUDGMENT—May 3, 1965

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed, and that this cause be, and it is hereby, Remanded to the said District Court in accordance with the opinion of this Court filed this day.

[fol. 296] Clerk's Certificate to foregoing Transcript (omitted in printing).

[fol. 297]

SUPREME COURT OF THE UNITED STATES

No. 382, October Term, 1965

FRANK J. PATE, Warden, Petitioner,

v.

THEODORE ROBINSON.

ORDER ALLOWING CERTIORARI—October 25, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted. The parties are requested to brief and argue, in addition to the questions presented, the question whether any of the further proceedings contemplated in the opinion of the Court of Appeals should be conducted in the appropriate Illinois courts rather than in the District Court.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

JUL 22 1964

JOHN F. DAVIS, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1964

RESPONSE NOT PRINTED

NO. 382

FRANK J. PATE, Warden,

Petitioner,

VS.

UNITED STATES ex rel. THEODORE ROBINSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT.

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IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1964

NO. _____

FRANK J. PATE, Warden,

Petitioner,

vs.

UNITED STATES ex rel. THEODORE ROBINSON,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT.**

Frank J. Pate, Warden, Illinois State Penitentiary, by William G. Clark, Attorney General of the State of Illinois, his attorney, prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on May 3, 1965.

CITATION TO OPINION BELOW.

The opinion of the Circuit Court of Appeals, printed in the Appendix hereto, is reported at 345 F. 2d 691.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on May 3, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

QUESTIONS PRESENTED.

1) Whether the issue of a defendant's sanity at the time of the crime raises a federal constitutional question cognizable on federal *habeas corpus*?

2) Whether the question of a defendant's sanity at the time of his trial raises such a question?

3) Assuming the question of his sanity at the time of the trial is cognizable in a federal *habeas corpus* proceeding:

- a) Whether that issue can be waived if the defendant does not raise it at trial?
- b) Whether the state hearing on that issue was full and fair in this case?

THE FACTS.

The respondent was indicted for murder by the Grand Jury in March, 1959. On arraignment counsel was appointed and the State's Attorney informed the court the respondent had previously been committed to a mental institution. Thereupon a behavior clinic examination was ordered. Subsequently a plea of not guilty was entered, the respondent waived trial by jury and a bench trial was commenced. (App. 5)

The State's evidence conclusively showed that on February 28, 1957, Flossie May Ward was shot and killed by the Respondent in a Chicago restaurant where she was employed. (App. 7-13)

The evening of the same day, Clarence Starr, a Chicago Police Officer, received information from one Robert Moore that the Respondent, who had been identified as the killer, was in Moore's apartment on the thirteenth floor of a Chicago apartment building. As three officers stepped out of the elevator respondent was half way between the apartment and the elevator. The officers did not recognize him and they proceeded to the apartment where Mrs. Moore informed them that the respondent had just left. The officers then noticed respondent who was still standing in the hall. Upon inquiry he identified himself as Robinson and was arrested and charged with murder. (App. 11-13)

The respondent at trial did not contest the fact that he fired the fatal shot but rather attempted to prove that he was insane at the time of the crime. His mother testified that when he was seven or eight he was hit on the head by a brick and that thereafter he had acted peculiarly and suffered from headaches. (App. 16-17)

His mother testified that when he was on leave from the service and staying with her, he flew into a rage for no apparent reason and kicked a hole in a bar in her living room. (App. 16)

Respondent's mother testified further that from the time he returned from the service he had a glare in his eyes and seemed to be lost in himself and when she attempted to speak to him he glared and said nothing was wrong with him. (App. 17)

Helen Calhoun, an aunt of respondent, testified to an incident which occurred in 1951 in her apartment when respondent paced the floor and said someone was after him. He refused to allow his mother to come into the room when she arrived at the aunt's apartment in response to the aunt's call. When his mother did gain admittance and tried to

hug respondent, he pushed her away telling her someone was going to shoot him. He was foaming at the mouth at that time (App. 18). On this occasion police were called and when they finally gained entrance against respondent's resistance, after one look at him, they said he would have to go to the hospital since he had lost his mind. (App. 19)

From Hines Hospital he was transferred by ambulance to County Hospital. During the trip from Hines to County Hospital it was necessary to hold him to prevent him jumping out. After a week in County Hospital, he was sent, by court order, to Kankakee State Hospital where he stayed until he was signed out by his wife six or seven weeks later. (App. 19)

In 1953, respondent attempted suicide, shooting himself in the head after he had killed his 18-month old baby. (App. 20) A prison term of approximately four years followed the killing of his baby.

Following release of respondent from the penitentiary, respondent's mother in the summer of '57 or '58, went to the 48th street police station and took out a warrant for him, telling the police she believed him to be insane and wanted to have him picked up so she could have him returned to a mental institution (App. 20). This warrant was never served and thereafter, shortly prior to February of 1959, his mother had a second warrant issued. (App. 21) His mother testified that he did not appear to be normal throughout this time; he looked "starey-eyed", paced the floor and usually refused to talk, that he looked extremely sad, glared at her and refused to speak to her. (App. 21) His mother's opinion, based on these observations, was that her son was insane, incapable of distinguishing right and wrong and he "thinks whatever he does is right." (App. 22)

It was brought out in the examination that respondent was a heavy drinker and acted strangely sometimes when he had been drinking, but that he also acted strangely when he had not been drinking. (App. 22)

Alice Moore, no relation, testified she had known respondent since he was ten years old. She corroborated the mother's testimony of the incident when he destroyed the bar in his mother's living room. It was her opinion when he is in his glaring, untalkative moods he is insane and does not know the difference between right and wrong. (App. 23) Mrs. Moore testified that the "bar" was one in which glasses were kept and to her knowledge there had never been any intoxicating beverages in the bar. (App. 23)

Respondent's grandfather, William Langham, testified he first noticed a change in his grandson following his return from the Army; that he had employed him to help paint ceilings and that respondent would suddenly stop working, come down the ladder and walk out without saying anything, apparently in a daze, and after being gone two or three hours, would return apparently all right. (App. 23) He also testified regarding an occasion when respondent and his wife were fighting and he attempted to kick in a door, gathered up his wife's clothing and was going to burn them. Police were called on this occasion.

The grandfather testified that as recently as three or four days prior to the time of the shooting of Flossie Mae Ward, the respondent seemed giddy. (App. 24) It was his opinion that since returning from the Army, respondent did not have a good mind, that he was insane and did not know the difference between right and wrong. (App. 24)

The respondent's aunt, recalled as a witness, testified she had known him since he was a baby (App. 26), and further corroborated the testimony of his mother as to the

incident at her apartment just prior to his commitment to the Kankakee State Hospital. When he first came to her home he told her someone was trying to kill him, and paced the floor "starey-eyed". She was washing windows when he arrived and he told her to get down from the window because they were trying to kill her too. Respondent on arrival at Hines Hospital with his aunt and his mother was starey-eyed, prancing about deliriously and was strapped to a wheelchair. (App. 26)

In recounting the occasion when respondent had killed his 18-month old son, Mrs. Calhoun testified that he brought the baby to her home as he had no place to go, that she went to work and upon her return saw the baby lying on the floor. She called the fire department ambulance and on arrival at the hospital it was determined the baby had been shot. At this time the aunt said respondent had a wild look in his eyes, was nervous, prancing, staring wildly, and that it was impossible to understand him when he talked. (App. 28-29) Respondent stayed with the aunt for a period of time thereafter, during which time he was extremely nervous and she was afraid of him, but the record is not clear as to whether it was '57-'58 or '58-'59. (App. 30)

A stipulation was made on respondent's behalf that a police officer, Theodore Davis, if called as a witness would testify that respondent, after the shooting of his 18-month old baby, in March of 1953, had gone to the South Park Police station and told Davis he wanted to confess a crime; that the respondent had a bullet wound in his head, and had attempted to commit suicide by jumping into a lagoon. (App. 25)

Although analysis of the medical records of the Kankakee State Hospital, which were introduced into evidence by stipulation (Defendant Exhibit No. 3), disclosed that when respondent was admitted to the hospital he was hearing

voices, seeing things, imagined someone was outside with a pistol aimed at him, and that he had been drinking heavily and might possibly be schizophrenic, the examiner concluded he had recovered and saw no objection to "giving him a try", inasmuch as his wife was requesting it. (App. 32-33)

Attempts by counsel for respondent to obtain other witnesses on his behalf were unavailing, as was the respondent's request, at the beginning of the trial, that various witnesses he subpoenaed along with everyone known to have been in the restaurant at the time of the shooting. (App. 14) Questioning of police officers and the assistant state's attorney revealed that most of the occurrence witnesses were not available.

When respondent asked that Mr. and Mrs. Robert Moore be subpoenaed, he could not tell what they would testify to and the court stated it could not subpoena people unless he told what they would testify to. (App. 15-16) Later the same day, after three of respondent's live witnesses had testified, respondent's counsel stated that there was a doctor from the Psychiatric Institute that he had been trying to contact, whom he felt could be reached by morning. The Court stated:

"If you subpoenaed him, I will issue an attachment. If you did not subpoena him, we cannot delay the trial. You must prepare your lawsuit before you go to trial. You are on trial now for two days. Other cases are waiting. We have to proceed. If you subpoenaed him, prepare a petition and I will send for him. If you did not subpoena him, it is unfortunate." (App. 25)

At the conclusion of respondent's evidence, it was stipulated that if Dr. Haines, the Director of the Behavior Clinic of the Criminal Court of Cook County were called as a witness, he would testify that he had examined the respondent approximately two months earlier and that the respondent at that time knew the nature of the charges against him

and was able to cooperate with counsel. A further stipulation, that he would testify that the respondent is sane, was rejected. (App. 30)

Final argument was waived by the State, and at the conclusion of the arguments for respondent, respondent again attempted to raise the issue of his desire to subpoena various witnesses, including the Moores. However, the Court pronounced his verdict of guilty. He was sentenced to life imprisonment, and he appealed, as an indigent, to the Supreme Court of Illinois where his conviction was affirmed. (22 Ill. 2d 162 [1961]) A petition for writ of *certiorari* to the United States Supreme Court was denied (368 U. S. 857) (R. 13)

In April 1962 a petition for writ of *habeas corpus* filed in the District Court was originally dismissed on April 18, 1962 for failure to exhaust State remedies. Subsequently that order was vacated and the petition reinstated, on the basis that later decisions of the United States Supreme Court showed that petitioner had exhausted his State remedies within the meaning of 28 U. S. C. § 2254. (App. 3)

The petition for writ of *habeas corpus* filed in the District Court indicated that petitioner's constitutional rights were violated in the 1959 State court proceedings, and further asserted petitioner was indigent and requested counsel be appointed to aid him. (App. 1-2) Leave was granted April 13, 1962 by the District Court to file his petition for writ of *habeas corpus* in *forma pauperis*, but counsel was not appointed. (App. 3) Motions in the District Court and this Court for certificate of probable cause and for leave to appeal were denied.

On respondent's motion, in 1963, to reinstate his petition for writ of *habeas corpus*, an order was entered by the District Court May 1, 1963, requiring respondent to furnish a

transcript of the record in the Criminal Court of Cook County. (App. 3)

The District Court, on May 27, 1963, vacated its prior order dismissing the petition for writ of *habeas corpus* for failure to exhaust State remedies, reinstated the petition and denied it without hearing, citing 22 Ill. 2d 162 (1961) as authority therefor, and on June 12, 1963 a certificate of probable cause and leave to appeal in *forma pauperis* was granted. (App. 4)

The United States Court of Appeals (Seventh Circuit) in a decision issued May 3, 1965, reversed and remanded for a hearing on the issue of Robinson's insanity at the time of the crime and his insanity at the time of the trial. A stay of the mandate of that court has been granted to permit presentation of a petition for *certiorari* by the People of the State of Illinois to the United States Supreme Court.

REASONS FOR GRANTING THE WRIT.

The Circuit Court of Appeals for the Seventh Circuit remanded this case to the District Court for a determination of two questions: (1) whether Robinson was insane at the time he committed the crime in question and (2) whether he was insane at the time of his trial. It is contended that on the facts of this case the decision of the state court on these issues is conclusive.

The question of a person's sanity at the time the alleged crime is committed is beyond the scope of a federal *habeas corpus* proceeding.

It is believed that the present decision is the first in which a federal appellate court has indicated that such a determination can be subject to collateral attack.

All other circuit courts which have considered the question have ruled that the question of a person's competency

at the time of the commission of a crime cannot be the basis for a writ of *habeas corpus*. *Taylor v. United States*, 282 F. 2d 16 (8th Cir. 1960); *Bishop v. United States*, 223 F. 2d 582 (D. C. Cir. 1955) rev'd on other grounds, 350 U. S. 961.

Other circuits have ruled that neither insanity at the time of the crime nor insanity at the time of the trial can form the basis for a collateral attack upon a conviction. *Hahn v. United States*, 178 F. 2d 11 (10th Cir., 1949); *Whelchel v. McDonald*, 176 F. 2d 260 (5th Cir. 1949); *Hall v. Johnson*, 86 F. 2d 820 (9th Cir. 1936).

Thus the present decision remanding the case for a determination of Robinson's insanity at the time of the crime is in conflict with the law established in at least five different circuits. It is also inconsistent with the decision of this Court in *Leland v. Oregon*, 343 U. S. 790.

In the *Leland* case this Court ruled that it was not a violation of due process of law for a state to adhere to the McNaughton test for insanity nor to require that the defendant prove his insanity beyond a reasonable doubt. If the issue of insanity at the time of the crime is to be reviewed in a collateral attack upon the conviction as a matter of federal constitutional law, the same test must be applicable to every defendant. It would no longer be a subject upon which the various states and federal circuits could adopt differing tests. Therefore, the decision in the *Leland* case which permits diversity in the tests applied and the burden of proof on this subject is inconsistent with the order requiring the District Court to review the question of Robinson's insanity at the time of the crime.

In its decision the Circuit Court of Appeals stated that *Smith v. Baldi*, 344 U. S. 561, establishes that "The conviction by a state court of a person for an alleged crime committed while insane violates due process of law under the Fourteenth Amendment." It is contended that *Smith v.*

Baldi does not stand for that proposition. The issue in this regard in that case was stated by this Court as follows:

"The next contention of petitioner is that he was denied due process. In substance this issue presents questions as to (1) whether the state should have allowed him to plead guilty without having first formally adjudicated the question of his mental competency, and (2) whether it should have permitted him to plead at all to a capital offense without affording him the technical services of a psychiatrist." (344 U. S. 561)

The only question raised was that of the fairness of the state procedure. This Court did not hold or indicate that if there were any question of the insanity of Smith at the time of the crime he should have been granted a *habeas corpus* hearing on this question. It is clear that this case in no way contradicts the prior authority which establishes that the question of the sanity of an individual at the time of the crime cannot be raised in a collateral attack upon his conviction.

It is, therefore, contended that the decision of the Circuit Court of Appeals requiring a full hearing on this question should be reviewed and reversed by this Court.

The question of Robinson's sanity at the time of the trial raises issues which are not clearly established. Prior to the decision of this Court in *Bishop v. United States*, 350 U. S. 961, there was a conflict between the circuits on whether insanity at the time of the crime could be raised as a collateral attack on a conviction. Compare *Hahn v. United States*, 178 F. 2d 11, (10 Cir. 1949); *Whelchel v. United States*, 176 F. 2d 260 (5th Cir. 1949); *Hall v. Johnson*, 86 F. 2d 820 (9th Cir. 1936), with *Sanders v. Allen*, 100 F. 2d 717 (D. C. Cir. 1938).

The *Bishop* case arose in the District of Columbia Circuit where the issue could be raised. The Court of Appeals

held that although the question could be entertained, they affirmed the decision of the trial court that Bishop was sane at the time of the trial. (223 F. 2d 582) This Court in a *per curiam* decision vacated the judgment and remanded the case "to the District Court for a hearing on the sanity of the petitioner at the time of his trial." (350 U. S. 961)

While some circuits have interpreted *Bishop* as establishing that the question of insanity is cognizable in a *habeas corpus* proceeding, the Tenth Circuit has consistently held to the contrary. *Nunley v. United States*, 283 F. 2d 561 (1960); *Hereden v. United States*, 286 F. 2d 526 (1961); *Clay v. United States*, 303 F. 2d 301 (1962). Thus a conflict also exists on this point which should be resolved by this Court.

Furthermore, the Respondent in the instant case never raised the issue of his insanity at the time of the trial. This is believed to be a waiver of that point. In *Fay v. Noia*, 372 U. S. 391, this Court restated the rule of *Johnson v. Zerbst*, 304 U. S. 458, 465 that for a waiver there must be "an intentional relinquishment or abandonment of a known right or privilege." The *Fay* case then said under those circumstances a federal right could be waived by a failure to raise it in a state prosecution. Here the Respondent, who was at all times represented by counsel, failed to raise the question of his insanity at the time of trial in the state proceedings even though it was his duty to do so under Illinois law. (*People v. Shrake*, 25 Ill. 2d 141). Yet, surely he was aware of that right because he raised the issue of his insanity at the time of the crime at the trial as his principal defense. It thus appears that all the elements of a waiver are present. At least there should be a hearing on the issue. However, the Court of Appeals remanded the case for a determination of the Respondent's sanity at the time of trial, thus foreclosing the issue of waiver.

Finally, it is believed that the facts elicited at trial are sufficient under *Townsend v. Sain*, 372 U. S. 293, to sustain the decision of the trial judge not to hold an evidentiary hearing on this point. True, the state trial judge never empaneled a jury to conduct a sanity hearing, but again the Respondent never requested one. Even in the absence of such a motion it is the judge's duty to empanel one if he has "a *bona fide* doubt" as to a defendant's present sanity. (*People v. Shrake*, 25 Ill. 2d 141). But the judge never experienced such a doubt. On arraignment the court was informed by the state that Respondent had previously been committed to a mental institution and a Behavior Clinic examination was ordered. At trial it was stipulated that if Dr. Haines, the Director of the Behavior Clinic of the Criminal Court of Cook County, were called as a witness, he would testify that he had examined the defendant approximately two months earlier and that at that time he knew the nature of the charges against him and was able to cooperate with counsel. This conclusion was reinforced by the personal observations of the experienced trial judge.

Because the Respondent raised the issue of his sanity at the time of the crime, he introduced all the evidence he had on the question of his sanity. It consisted of the testimony of four lay witnesses who concluded that he was insane.

The gist of this testimony was that a brick had fallen on the defendant's head when he was seven, that he acted somewhat "peculiar" thereafter, that once he kicked a hole in a family bar for no apparent reason, that he frequently was sullen and complained of headaches, that he quarrelled with his wife, that he was very nervous, that he often walked abruptly from his work and that in the past he had appeared "glassy-eyed" or in a daze. Clearly none of this testimony had any bearing on the issue of whether defendant understood the nature of the charges against him and could cooperate with his counsel.

More serious was the testimony that defendant in 1951 believed someone was going to kill him and that subsequently he was admitted to Kankakee State Hospital for six weeks, and that in 1952 he shot his baby and attempted suicide. However, the medical record from Kankakee State Hospital stated that defendant when admitted had been drinking heavily and described classical symptoms of delirium tremens. He was adjudged fully recovered when he was discharged. The record also revealed that defendant was convicted of the slaying of his child. This shows that he was unable to establish his insanity at that time.

On the basis of this record in the trial court, it is believed that the Illinois Supreme Court correctly affirmed the conviction and the Federal District Court properly dismissed the petition for a writ of *habeas corpus*. The Court of Appeals, therefore, improperly reversed that dismissal and that decision should be reversed.

CONCLUSION.

For the foregoing reasons this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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July —, 1965

APPENDIX.

In The
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 14253 SEPTEMBER TERM, 1964 SEPTEMBER SESSION, 1964

United States *ex rel.*

Theodore Robinson,

Petitioner-Appellant,

v.

Frank J. Pate, Warden.

Respondent-Appellee.

} Appeal from the
United States
District Court for
the Northern Dis-
trict of Illinois,
Eastern Division.

May 3, 1965

Before SCHNACKENBERG, KNOCH and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* The district court denied, without hearing evidence, Robinson's petition under the Habeas Corpus Act, 28 U. S. C. §§2241-2254, to vacate his state conviction for murder and his life sentence. He has appealed, represented by counsel appointed by this court. We reverse and remand.

The district court in denying the petition relied upon the record and transcript of the murder trial without a jury in the Criminal Court of Cook County in 1959, and the opinion of the Supreme Court of Illinois in *People v. Robinson*, 22 Ill. 2d 162, 174 N. E. 2d 820, *cert. denied* 368 U. S. 857 (1961).

Robinson's petition alleges that he was denied due process of law under the Fourteenth Amendment at his bench trial by the State's failure to prove beyond a reasonable doubt his sanity at the time of the alleged murder, by the trial court's failure to conduct on its own Motion a hearing into his competence to stand trial, and by the court's denial of his Sixth Amendment right to compulsory process.¹

Robinson contends on this appeal that the district court erred in failing to require respondent to file a return to his petition, in refusing to appoint counsel for him, and in failing to hold an "evidentiary hearing" in accordance with the rules in *Townsend v. Sain*, 372 U. S. 293 (1962).

We recognize the severe pressure upon the state criminal trial courts to dispose of cases with dispatch in order to maintain a reasonable currency between indictment and trial. This salutary goal, however, must not be reached at the expense of constitutional rights. Robinson's trial was conducted under an undue preoccupation with hurried disposition in an atmosphere charged with haste, hardly consistent with the gravity of a capital case and protection of the right to due process.² One result of the unusual

1. Judges Schnackenberg and Knoch do not concur in that portion of this opinion, beginning at p. 8, dealing with the Sixth Amendment question. See the specially concurring opinion of Judge Schnackenberg, *infra*, p. 12, and the dissenting opinion of Judge Knoch, *infra*, p. 12.

2. The following statements are taken from the transcript of the second day of the trial, commencing with the presentation of the case for the defendant late in the morning session. Number references are to the page in the transcript.

(207) The Court: Let's proceed, please. We have wasted fifteen minutes. We have thousands of indictments wait-

haste was denial to Robinson, an indigent represented by court-appointed counsel and obviously without funds to pay for expert psychiatric testimony, of a fair opportunity to obtain volunteer expert testimony from a public agency. We shall consider this result later in the opinion.

The conviction by a state court of a person for an alleged crime committed while insane violates due process under the Fourteenth Amendment. *Smith v. Baldi*, 344 U. S. 561, 570 (1952) (Frankfurter, J., dissenting); *People v. Robinson*, 22 Ill. 2d 162, 174 N. E. 2d 820 (1961). And while the State must prove the sanity of the defendant at

ing for trial. I can't waste fifteen minutes waiting for defense counsel. Let's move.

(208) Mr. McDermid: May I have one minute to satisfy—

The Court: We have wasted eighteen minutes. You must prepare your lawsuit before you come to court. We have been on trial now for a whole day and a half and you have had ample time to talk to your client. Go ahead, talk to him now.

(209) The Defendant: I would like that the court be adjourned until tomorrow morning.

The Court: No, sir.

The Defendant: To give me time to confer with counsel for the calling of witnesses.

The Court: No, sir. We have been waiting here since 11:00 o'clock, waiting for your lawyer. It is now 11:30. We have been on trial a day and a half.

(246) The Court: All right. Call your next witness. I understand that the lady is here now, Helen Calhoun. Helen Calhoun is here. Let's move along a little faster, please.

(259) The Court: Are you going to be with this witness much longer? We are well into the lunch hour.

(273) [immediately following the conclusion of the final argument for the defendant:]

the time of the alleged crime, that burden is satisfied in Illinois by the presumption of sanity until the introduction of evidence sufficient to raise a reasonable doubt of the defendant's sanity, at which time the necessity of affirmative proof of sanity beyond a reasonable doubt becomes the burden of the State. *People v. Skeoch*, 408 Ill. 276, 280, 96 N. E. 2d 473 (1951); *People v. Patlak*, 363 Ill. 40, 1 N. E. 2d 228 (1936).

Robinson's defense to the indictment was insanity at the time of the alleged murder. He contends that he was insane at the time of the trial also, or that at least there was a bona fide doubt of his sanity raised so that the trial judge on his own motion should have impanelled a jury and conducted a sanity hearing pursuant to the then 38 Ill. Rev. Stat. §§592-593 (1963).³

The Court: Very well. All right, bring up the defendant please.

The defendant is found guilty of the crime of murder. He is sentenced to the State Penitentiary for a term of his natural life. Take him away.

The Defendant: Judge, your Honor, may I say something before you take me out of your courtroom?

The Court: Yes, sir.

[The defendant then protested against failure of his counsel to call certain witnesses.]

The Court: The Court is satisfied beyond a reasonable doubt—

The Defendant: Still and all, may I still say something?

The Court: (Continuing) —that you killed this woman. Whether those were your clothes or not your clothes, it doesn't make any difference. Take him away. Call the next case.

3. *People v. Burson*, 11 Ill. 2d 360, 368, 370, 143 N. E. 2d 239 (1957); *Brown v. People*, 8 Ill. 2d 540, 134 N. E. 2d 760 (1956).

Robinson did not testify. The defense presented four relatives and friends as lay witnesses and the stipulated testimony of a police officer on the question of his sanity. Each witness stated his opinion that Robinson was insane and did not know the difference between right and wrong.

The testimony showed a continuing history of erratic and violent behavior by Robinson from the time he was struck on the head by a falling brick as a child until the unusual circumstances of the fatal shooting and his arrest. Incidents related included a commitment for a short time to a state mental hospital in 1951, from which he was released at his wife's request, the killing of his eighteen month old baby⁴ and his contemporaneous attempted suicide, an attempt to burn his wife's clothes, and his mother's attempts to have him recommitted within a year before the alleged murder.

Robinson's behavior in the shooting and his subsequent arrest was also erratic. Flossie Mae Ward, the victim, a woman with whom Robinson had been living, worked at the restaurant where the shooting occurred. Robinson entered the restaurant carrying a gun which he pointed at Mrs. Ward, within a distance of five feet or less, without saying a word. Upon seeing him she said, "Ted, don't start nothing tonight," and went back to her work. Robinson then moved quickly to the back of the room, a distance of twenty feet or more, and jumped over the counter; as a result, two other employees were placed between him and Mrs. Ward. He rushed past them and fired one or more shots at the victim. Both Robinson and Mrs. Ward then

4. This incident occurred in 1953. The record is unclear on this point, but it appears that Robinson served a sentence of only three years after being convicted of shooting the baby.

jumped over the counter and ran out the door onto the sidewalk, where her body was found.

The evening following the shooting, Robert Moore told the police that Robinson was at Moore's apartment. When officers in uniform arrived on the floor of the apartment, Robinson was standing in the hall near the elevator. The officers went by him, talked to Mr. and Mrs. Moore in Robinson's view, with guns drawn, and being informed that Robinson had just left, went back down the hall and asked Robinson to identify himself. He did. Robinson had remained where he was, even though he could have entered the elevator without passing the policemen while they talked to the Moores.

The shooting occurred, and the trial was held, in 1959. The State introduced the record of Robinson's discharge from a mental hospital in 1951, a stipulation of an adjudication in 1953 that he was sane, and a stipulation that the director of the court's Behavior Clinic would, if called, testify, on the basis of an examination two months before trial, that Robinson was able then to understand the charge against him and to cooperate with his counsel.

The morning of the second day of the trial the court was told by Robinson's attorney that they had hoped to have a doctor from the Psychiatric Institute testify that afternoon but had been unable to reach him. He said they were sure the doctor could be called the next morning, but the court, when no assurance was given that the doctor had been subpoenaed, refused to continue the case until the next morning in order to hear the doctor's testimony.*

5. The Court: Did you subpoena him?

Mr. McDermid: I understand that it was done but I am not really sure.

The Court: If you subpoenaed him, I will issue an attachment. If you did not subpoena him, we cannot delay

The trial concluded that afternoon without the doctor's testimony and without an expert witness called for or against Robinson.

After the verdict and sentence to life imprisonment, one of Robinson's attorneys stated that he had made two or three dozen calls to psychiatrists, that he had contacted the Illinois Psychiatric Society and its officers, and that he had asked a private psychiatrist for assistance—all to no avail. He stated that he did not believe in subpoenaing a psychiatrist to testify when he did not know if the particular doctor would be cooperative.

The trial court made no express finding that Robinson was sane at the time of the alleged murder, but that finding is implicit in the judgment of guilt. The Illinois Supreme Court on appeal held, however, that the evidence at the trial failed to raise a reasonable doubt as to Robinson's sanity, since most of the incidents related by the witnesses occurred several years prior to the fatal shooting and there was no evidence that Robinson's mental illness was "of a permanent and continuing nature." *People v. Robinson*, 22 Ill. 2d 162, 169, 174 N. E. 2d 820 (1961).

But that court, in its opinion, made no mention of the hasty trial of this capital charge with the denial of a reasonable opportunity to Robinson to obtain psychiatric testimony which could have had substantial bearing upon the very question of Robinson's "permanent and continuing" mental state. Presumably the Illinois Supreme Court saw little importance in the testimony of Robinson's mother of her unsuccessful attempts to have the police arrest her son so that he could be confined in 1958, or in the testimony

the trial. You must prepare your lawsuit before you go to trial. You are on trial now for two days. Other cases are waiting. We have to proceed. If you subpoenaed him, prepare a petition and I will send for him. If you did not subpoena him it is unfortunate.

concerning Robinson's eccentric behavior in committing the alleged murder. The mother's attempt to have Robinson committed the year before that homicide and his odd antics in the homicide were five and six years after the adjudication of sanity. Finally, although the Illinois Supreme Court did consider the claim of Robinson that he was denied the right to compulsory process to obtain as witnesses Mr. and Mrs. Moore, outside of whose apartment Robinson was arrested the day after the homicide, the court, among other things, stated that no showing had been made that the witnesses sought were material. It could be that their observation of Robinson the day following the homicide was material to the question of his insanity the previous night.

We turn now to the question of Robinson's competency to stand trial.

Due process requires that a person be not convicted of a crime while he is insane. *People v. Robinson*, 22 Ill. 2d 162, 174 N. E. 2d 820 (1961). And the denial of a reasonable request to obtain the services of a necessary psychiatric witness is effectually a suppression of evidence violating the fundamental right of due process. See *United States v. Ogilvie*, 334 F. 2d 837, 843 (7th Cir. 1964). Neither Robinson nor his attorney moved for an inquiry into defendant's sanity at the time of trial. In Illinois, however, the trial judge is required, whenever a bona fide doubt is raised as to the defendant's sanity at the time of the trial, to impanel a jury and conduct a sanity hearing. *People v. Lego*, Ill. 2d, 203 N. E. 2d 875 (1965); *People v. Robinson*, p. 167. This procedure satisfies the requirement of due process; to deny the established procedure to a particular accused, however, is a denial of due process. *Thomas v. Cunningham*, 313 F. 2d 934, 938 (4th Cir. 1963).

As we have indicated, Robinson did not testify in his behalf, and the testimony with respect to his sanity came

from relatives and friends. The opinion of these witnesses was that Robinson did not know the difference between right and wrong. We have discussed at length their testimony hereinabove. The only evidence introduced for the prosecution specifically on the question of Robinson's competency to stand trial was a stipulation at the end of Robinson's case that if called, Dr. Haines, the director of the Behavior Clinic of the Criminal Court of Cook County, would testify that he examined Robinson about two months prior to trial and that in his opinion Robinson was at that time able to understand the nature of the charges against him and to cooperate with counsel. The Assistant State's Attorney sought a broader stipulation from defense counsel. Failing in this, he told the court,

Now the defense raised here is such that I think we should have Dr. Haines' testimony as to his opinion whether this man is sane or insane. It is possible that the man might be insane and know the nature of the charge or be able to cooperate with his counsel. I think it should be in evidence, your honor, that Dr. Haines' opinion is this defendant was sane when he was examined.

The trial court stated that the doctor's testimony was not needed, since there was already enough in the record.

There was no express finding by the trial court that defendant was competent to stand trial. There is only our inference, of that finding, drawable from the judgment of guilt and from the trial court's statement referring to the State's Attorney's suggestion that the director of the Behavior Clinic should be called as a witness, that "You have enough in the record now. I don't think you need Dr. Haines."

Denial of a reasonable opportunity to obtain psychiatric testimony for Robinson could also have weighed heavily on

the question of his competency to stand trial. The case closed with no psychiatric witnesses called to give testimony either on the defense of insanity or on Robinson's competence to stand trial. We have pointed out that denial of a fair opportunity to obtain necessary testimony is effectually to suppress it. See *United States v. Ogilvie*, 334 F. 2d 837, 843 (7th Cir. 1964). The Illinois Supreme Court thought no facts were brought to the trial court's attention to raise a doubt of defendant's sanity requiring an inquiry; that the "traits, conduct and crimes" of Robinson were not proved to be "true manifestations of insanity"; that the conclusions of the defense witnesses were based on incidents many years before the trial, having little relevancy at the time of trial; that the court was aware of Robinson's confinement eight years earlier, and of the records of his condition and discharge and of his adjudication of sanity six years before the trial; and that the court had before it the stipulation concerning Dr. Haines, the director of the Behavior Clinic, as well as Robinson's display at the trial of his ability to rationally assist in the conduct of his defense.

We point out again that the only likely means Robinson had to prove his "traits, conduct and crimes" were "true manifestations" of insanity was the psychiatric testimony he was denied a reasonable opportunity to obtain; and again we note his mother's testimony of her unsuccessful attempt in 1958 to have the police arrest her son for confinement because of his irrational conduct at the time and the testimony of his erratic conduct in committing the homicide, both of which events occurred after the adjudication of sanity.

We are mindful of the admonitions to the district courts in *Townsend v. Sain*, 372 U. S. at 318, with respect to "their delicate role in the maintenance of proper federal-state

relations." But the district court is reminded in *Townsend* of its power to "try the facts anew," 372 U. S. at 312, where an applicant in habeas alleges facts which, if proved, would entitle him to relief, and of the duty to exercise that power in a federal evidentiary hearing "unless the state court trier of facts has, after a full hearing, reliably found the relevant facts." 372 U. S. at 313.

Robinson's petition, and the record, present a substantial question of denial of his Sixth Amendment right to compulsory process⁶ for witnesses in his behalf. At the commencement of the defendant's case Robinson protested that his attorneys had failed to subpoena two witnesses as he had instructed them. One of the attorneys stated to the court that he did not remember any such instruction. When Robinson was asked what the witnesses would testify to he replied that he did not know, but that he wanted them subpoenaed. The court stated that "We can't subpoena people unless you tell us what they are going to testify to."

The witnesses Robinson wanted called were Mr. and Mrs. Robert Moore. Prior testimony had disclosed that Robinson was present in their apartment the day after the shooting and that they had caused, and witnessed, his arrest. Hearsay testimony of their statements at the time of the arrest had been admitted into evidence without objection.

Following the announcement of the verdict and sentence, one of Robinson's attorneys stated that following Robinson's request during the trial for subpoenas he had talked to

6. U. S. Const. amend. VI.

"In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor"

the Moores and determined that their testimony would not be helpful. He stated that Robinson was told of this and agreed that they should not be called.

In the wake of *Gideon v. Wainwright*, 372 U. S. 335 (1963), holding that the Sixth Amendment right to counsel is embraced in the Fourteenth Amendment to protect that right against state action,⁷ it follows that the right of compulsory process must similarly be included in the Fourteenth Amendment protection.⁸ This right is as "implicit in the concept of ordered liberty"⁹ as the right to counsel. In many cases unless a defendant had the opportunity to compel witnesses to appear in his behalf, the right to counsel would be meaningless. Unreasonable denial of a continuance to afford the defendant a timely opportunity to obtain witnesses by compulsory process was held to be a violation of this constitutional right in *Paoni v. United States*,

7. Since this opinion was submitted the Supreme Court has decided in *Pointer v. Texas*, 33 U. S. L. Week 4306 (April 5, 1965) that a defendant's Sixth Amendment right to be confronted with the witnesses against him, and to cross-examine them, is applicable to the states by virtue of the Fourteenth Amendment. ("We hold today that the Sixth Amendment's right to an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment.") There is good reason to anticipate that before long the right to compulsory process for obtaining witnesses in his favor will likewise be made applicable to the states by the Supreme Court.

8. See *MacKenna v. Ellis* 263 F. 2d 35 (5th Cir.), cert. denied 360 U. S. 935 (1959); *MacKenna v. Ellis*, 280 F. 2d 592 (5th Cir. 1960), modified on rehearing en banc 289 F. 2d 928 (5th Cir.), cert. denied 368 U. S. 877 (1961).

9. *Palko v. Connecticut*, 302 U. S. 319, 325 (1937).

281 Fed. 801 (3rd Cir. 1922). And this basic right to process can be understandingly waived only by a defendant, not by his attorney. Cf. *Fay v. Noia*, 372 U. S. 391, 439 (1963).

If, as alleged by Robinson, he immediately upon learning that his attorneys had failed to subpoena Mr. and Mrs. Moore as he had instructed them, requested that they be subpoenaed, and if he did not later understandingly abandon his desire to have them called, then his constitutional right was violated. It was not necessary for him, as the state seems to have thought, as a prerequisite to the exercise of this right to be able to tell the court what testimony he expected from the witnesses. Without any specification by Robinson, the relationship of the Moores to the case should have been apparent from the testimony concerning Robinson's arrest. They saw Robinson the day after the homicide and could have given testimony of their observation of him, on the question of his insanity at the time.

A review of the record of the state trial persuades us that Robinson was convicted of murder and sentenced to life imprisonment in an unduly hurried trial without a fair opportunity to obtain necessary expert psychiatric testimony in his behalf, without sufficient development of facts on the issues of insanity at the time of the homicide and at the trial, and upon a record which does not show that the state court "after a full hearing reliably found the relevant facts."

We think our consideration and disposition of the foregoing questions compel the conclusion that the district court erred in not requiring a return to be filed by respondent to Robinson's petition. Under the mandatory provi-

sions of 28 U. S. C. § 2243¹⁰ a return is required unless the petition is patently frivolous or obviously without merit. *Brooke v. Anderson*, 317 F. 2d 179 (D. C. Cir. 1963); *Higgins v. Steele*, 195 F. 2d 366 (8th Cir. 1952). We hold that an evidentiary hearing was mandatory. The cause will be remanded for that purpose.

The cause is remanded to the district court with directions to appoint counsel for Robinson; to require the respondent to file a return; to proceed with a determination of the question whether, when Robinson committed the alleged murder in 1959, he was sane; and to provide a fair opportunity for appointed counsel—with whatever aid the district court can provide him—to obtain expert witnesses to testify on the question. If Robinson is found by the court to have been insane at the time in question he should be ordered released from custody of the respondent; such release should, however, be delayed for a reasonable time to be set by the district court for an opportunity by the appropriate State authorities to examine into Robinson's present mental health.

The district court should also determine upon the hearing whether Robinson was denied due process by reason of failure of the trial court on its own motion to impanel a jury and conduct a sanity hearing upon his competence to stand trial. If the court finds that Robinson's federal constitutional rights were violated in that respect, he should be ordered released, but such release may be delayed

10. "A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto."

for a reasonable time to be set by the district court to permit the State of Illinois to grant Robinson a new trial.

Mr. John C. Tucker, of Chicago, Illinois, was appointed by this court to represent petitioner on this appeal. We thank him for his able and devoted efforts on behalf of his client.
No. 14253

SCHNACKENBERG, *Circuit Judge*, specially concurring.

I approve and concur in Judge Kiley's opinion, with the exception of that part dealing with Robinson's right to compulsory process for witnesses in his behalf, based on the Sixth Amendment. I believe that the supposed difference of opinion between Robinson and his attorneys as to whether these witnesses should be called or not, does not afford a basis for a charge of a violation of his constitutional rights.

KNOCH, *Circuit Judge* (dissenting). Regretfully, I find myself in disagreement with the opinion of the majority.

As the Illinois Supreme Court noted in its opinion on defendant's writ of error proceeding, neither defendant nor his counsel requested a sanity hearing. Granted that it was the duty of the Trial Judge to impanel a jury to determine the issue if the facts brought to the Court's attention or the personal observations of the Trial Judge raised a bona fide doubt of defendant's sanity. Here the Trial Judge, who was advised of the facts of the defendant's past medical history, had more than the usual opportunity to evaluate the defendant's demeanor in Court because of the several colloquys between the defendant and the Judge. Manifestly the Trial Judge experienced no bona fide doubt as to defendant's sanity. Lacking his unique advantages for such observation, it seems to me somewhat presumptu-

ous for this Court, or the District Court, to say that he ought to have entertained such doubts.

As to denial of continuance to subpoena two additional witnesses, whom defendant's counsel had not seen fit to call, it seems only fair to me that the Trial Court be given some inkling of the nature of their anticipated testimony to justify the continuance sought mid trial.

I would affirm the decision of the District Court. In my opinion the Illinois Supreme Court has adequately dealt with the issue raised here and its decision should not be disturbed.

A true Copy:

Teste:

.....
*Clerk of the United States Court of
Appeals for the Seventh Circuit.*

DEC 1 0 1965

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1965

NO. 382

FRANK J. PATE, Warden,

Petitioner,

vs.

UNITED STATES ex rel. THEODORE ROBINSON,

Respondent.

(On Writ of *Certiorari* to the United States Court of Appeals for the Seventh Circuit.)

BRIEF FOR PETITIONER.

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BRIEF FOR PETITIONER.

OPINION BELOW

The opinion of the Circuit Court of Appeals for the
Seventh Circuit is reported at 345 F. 2d 691.

JURISDICTION

The opinion and judgment of the Circuit Court of Appeals for the Seventh Circuit were entered May 3, 1965. The petition for *certiorari* was filed on July 22, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

QUESTIONS PRESENTED.

1) Whether the issue of an accused's sanity at the time of the crime raises a federal constitutional question cognizable on federal habeas corpus?

2) Assuming the question of one's competence at the time of the trial is cognizable in a federal habeas corpus proceeding:

(a) Whether that issue was waived by the defendant's failure to raise it at the trial?

(b) Whether the evidence at the state trial on that issue required the Trial Judge on his own motion to empanel a jury to determine respondent's present sanity.

3) Assuming that hearings on the question of respondent's sanity at the time of the crime and sanity at the time of the trial should now be held, whether they should be held in a state or federal court?

CONSTITUTIONAL PROVISION INVOLVED:

Constitution of the United States, Amendment XIV provides in pertinent part:

"nor shall any State deprive any person of life, liberty, or property, without due process of law;"

STATEMENT

The respondent, Theodore Robinson, was indicted on two counts for the murder of one Flossie May Ward (R. 18). He waived a jury trial and pleaded not guilty to the charge. A trial ensued in the Criminal Court of Cook County, Illinois. (R. 21, 22). The judge found him guilty and sentenced him to life imprisonment. (R. 165). A writ

of error was taken to the Illinois Supreme Court, which affirmed the conviction in *People v. Robinson*, 22 Ill. 2d 162, 174, N. E. 2d 820, *cert. denied* 368 U. S. 857 (1961). Thereupon the respondent filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois, Eastern Division. On May 27, 1963, the petition was denied on the authority of the Illinois Supreme Court determination. (R. 16). He was granted a certificate of probable cause by that court and appealed to the United States Court of Appeals for the Seventh Circuit which reversed the order of the district court and remanded the cause for a hearing on the issue of Robinson's sanity at the time of the crime and on the issue of whether due process required the Judge on his own motion to hold a sanity hearing on the issue of his competency at the time of the trial. (R. 180). This Court subsequently granted certiorari. (R. 183)

The transcript of respondent's trial was introduced in the habeas corpus proceedings and shows the following facts were established at his trial:

The crime.

The respondent, Robinson, and the victim, Flossie May Ward, were living together in a common law status. (R. 35, 136). The victim was employed at the Collins Barbeque House at 1035 East 63rd Street in Chicago. (R. 38, 61). She worked a shift which began at 10:00 P. M. and ended at 4:00 A. M. (R. 39) or 5:00 A. M. (R. 61). The respondent would stop in at the barbeque house during these hours for meals about three or four nights a week and often came and picked up the victim after her work shift had ended. (R. 42-43, 62)

On February 25, 1959, the victim, another witness by the name of Neddie Batts, and a cook, Jim Paul Hackman,

were working behind the counter when Robinson entered the barbeque house wearing a blue coat and a brown hat. (R. 46, 67). He rushed in and jumped over the counter (R. 49, 64). The victim said to him "Ted, don't start nothing tonight." (R. 44, 69). Robinson laid his hand on the counter and a gun was visible in his grasp. (R. 70). Neddie Batts and Jim Hackman each heard shots (R. 44, 64-66) and Hackman noticed that the gun was pointed toward the victim (R. 66). Miss Ward, who was by the front of the establishment, jumped over the counter. (R. 44). Robinson then leaped the counter and chased her out of the front door. (R. 44). The victim was subsequently found dead (R. 34), on the sidewalk in front of the barbeque (R. 93) and the cause of death was established to be a gunshot wound in the head. (R. 124)

Respondent's arrest.

On the following day Robert Moore came to the apartment of Officer Starr who lived in the same building with him at 141 N. Wolcott in Chicago and told him that he had just received a call from his mother telling him that she had received a call from the respondent's mother telling her that respondent had killed the victim and a Reverend Elmer Clemens. Moore said that Robinson was then in Moore's apartment and asked Starr to go up and arrest him. (R. 80, 81).

Officer Starr called and asked for additional officers. He met Officers Kerfman and Elsoos in the lobby and they went up to Moore's apartment on the thirteenth floor. (R. 81) Upon their knock a woman answered the door and answered that Respondent had just left. (R. 81.) They then realized a man standing in the hallway who they had first seen when they got off the elevator was Robinson. (R.

81, 89). While Officer Starr was in the apartment, the other officers had had Robinson in vision (R. 90). They went up to him and asked who he was. He admitted he was Theodore Robinson and he was placed under arrest. (R. 82)

About an hour or an hour and a half after the arrest, Officer Starr went to the Moore's apartment with Officer Creed. They, together with Moore and his wife, found a navy blue overcoat and a brown felt hat in the Moore's closet. The overcoat had a .25 Colt automatic wrapped in a white handkerchief in the inside pocket. (R. 82-83). Robinson subsequently admitted the clothes were his but denied ownership of a gun. (R. 85) The gun was identified at the trial as the weapon which fired the fatal bullet. (R. 119, 123).

Respondent's mental condition

After the State had closed its case which established the before-mentioned facts, the respondent introduced his evidence. This testimony did not relate to the happenings on February 28, 1957, but was limited to evidence of his mental condition.

This evidence tended to show that the respondent was a normal child until he was about seven or eight (R. 131, 144). At that age he was hit on the head with a brick dropped from a third floor. (R. 131.) Thereafter he acted "a little peculiar", complained of headaches and appeared "cockeyed" (R. 131), although no unusual circumstances occurred until he entered the army. (R. 131.)

Once when he was in the service he came home on furlough. His mother prepared dinner for him and his girl friend. He was sitting down and talking with the girl when he jumped up, ran to a small bar in the apartment

and kicked a hole in it (R. 132, 141), after his mother refused him some money he requested. (R. 165).

After he returned from the army he usually had a glare in his eye and seemed to be lost in deep study most of the time. (R. 132-133). He often helped his grandfather painting. While he was working he would sometimes leave the job in what seemed to be a daze without saying anything and come back in two or three hours in good condition. (R. 144). Once he had a fight with his wife, took her clothes out in the yard and was going to burn them before he was stopped. (R. 144, 145.)

During 1952, he went to his aunt's house and complained that someone was trying to shoot him. His mother was called and when she came he fought to keep her from entering through the door. He had a "starey look and seemed to be just a little foamy at the mouth." (R. 133). The police were called and he tried to keep them from entering. He was taken to a Veterans' Hospital, sent from there to a county hospital, and was finally admitted to Kankakee State Hospital, a mental institution. (R. 133-135, 150-151).

The Kankakee Hospital Report on his mental condition at this time states:

"Was drinking and went to the Psychopathic Hospital. He imagined he heard voices, voices of man and women and he also saw things. He saw a little bit of everything. He saw animals, snakes and elephants and this lasted for about two days. He went to Hines. They sent him to the Psychopathic Hospital. The voices threatened him. He imagined someone was outside with a pistol aimed at him. He was very, very scared and he tried to call the police and his aunt then called (fol. 272) the police. He thought he was going to be harmed. And he says this all seems very foolish to him now. Patient is friendly and tries to cooperate." (R. 164).

He was released. (R. 161) Subsequently, he and his wife were separated. He shot his child and shot himself in the head and jumped into a lagoon. Later he went to a police station and surrendered. (R. 148, 153-156.) For this crime he was convicted and sentenced to the Illinois State Prison at Joliet. (R. 136.)

He was released in 1956 (R. 136). Thereafter his mother had a warrant for his arrest issued because he was fighting so much. (R. 136-137.)

Four witnesses, his mother, his grandfather, his aunt, and a friend of the family, testified that in their opinion he was insane and unable to distinguish right from wrong. (R. 138, 142, 146, 157.)

In rebuttal, there was a stipulation entered into between counsel that if Dr. William H. Haines, the Director of the Behavior Clinic of the Criminal Court of Cook County, were called he would testify that he examined the respondent in June of 1959 and that in his opinion Robinson knew the nature of the charge pending against him and was able to cooperate with his counsel in the defense of those charges. (R. 160, 161.)

Colloquies concerning the calling of witnesses.

After the close of respondent's case his attorney stated to the court that Robinson was concerned about the subpoenaing of certain witnesses whose names were on the witness list. The attorney stated that they had investigated them and did not believe their testimony would add anything to the respondent's case but that respondent wished everyone to testify. (R. 126). At that point the following colloquy between Robinson and the court occurred:

"The Defendant: Judge, your Honor, they were on the State's witness list and the State said they had

several witnesses. They produced two. For what reasons, I don't know, but I am on trial here and I would like to be given every consideration and I would like—

“The Court: You will get every consideration.

“The Defendant: I would like that the court be adjourned until tomorrow morning.

“The Court: No, sir.

“The Defendant: To give me time to confer with counsel for the calling of witnesses.

“The Court: No, sir. We have been waiting here since 11:00 o'clock, waiting for your lawyer. It is now 11:30. We have been on trial a day and a half.

“The Defendant: I thought it was by agreement. When I saw him I told the lawyer we weren't ready now.

“The Court: No, sir. Who are the witnesses you want?

“The Defendant: I don't have the list; if I could see the list.

“The Court: Get the list. Who are the witnesses?

“Mr. Conley: I am handing our list of witnesses to counsel now.

“Mr. McDermid: And I am handing this to Theodore Robinson so that he can satisfy himself at this time.

“The Defendant: I am unfamiliar with any of those names who names appear on that list.

“The Court: Which witness do you say that you want?

“The Defendant: I understand that there was other people present besides the one that was presented here to the Court.

“The Court: Well, who are they?

“The Defendant: I do not know by name.

"The Court: "If you don't know them—

"The Defendant: I couldn't tell by looking at the list here because I do not know the names of the people on the list.

"The Court: If you will tell your counsel what witnesses you want—

"The Defendant: If the State has a list of the ones, the witnesses, that they didn't call, I would ask the State's Attorney to familiarize me with the list.

"The Court: Is this the complete list?

"Mr. Conley: Excuse me, Judge. There were witnesses that were not called in this case, one of which could not be found. That is—

"The Court: Who was that?

"Mr. Conley: A Miss Butler. And a Mary Lou Collins, I understand, was served but she left on a plane for California yesterday around noon, so she is not available. And, of course, the one who can't be found is not available. However, they would be State's witnesses and there is nothing that I would like better than to have those two people here. The other witnesses who were not called were police officers, partners of the officers that testified and their evidence would only be cumulative and similar to the testimony that has been heard already.

"The Court: Which witnesses do you want to call?

"The Defendant: The witnesses that testified here for the State said there was six or seven, eight some people present there at the time and whoever those people are, I mean if they were present at the time they arrived, the investigating officer arrived at the scene of the crime—

"The Court: Do you have the list of witnesses that were in the restaurant at the time of the shooting?

"Mr. Conley: Yes, Maxine Butler, the one which I referred to already.

"The Court: Is that the one who went to California?

"Mr. Conley: No, sir, that is the one who hasn't been found.

"The Defendant: I am talking about the patrons, the people they say—

"The Court: That is what I am talking about.

"Mr. McDermid: My investigation has not been able to turn up the names of any of the patrons that were in the place.

"The Court: Do you have the names of the patrons, Mr. State's Attorney?

"Mr. Conley: No, sir, we don't.

"The Court: Do the police have them?

"Mr. Conley: I don't think they have, Judge.

"The Court: Is Breckenridge here? Get him out here.

"Mr. Conley: The police naturally were interested in finding as many witnesses as possible, and I am convinced that this list of witnesses includes all that were found, including the names and addresses of them.

"The Defendant: Also, Judge, your Honor—

"The Court: Officer Breckenridge, did you get the names of the patrons that were in the restaurant at the time of the shooting?

"Officer Breckenridge: No, all of them fled, your Honor.

"The Court: They were not there when you arrived?

"Officer Breckenridge: No, sir.

"The Court: What else do you want, Mr. Robinson?

"The Defendant: Well—

"Mr. McDermid: May I say, your Honor, to the witnesses and one of the witnesses I did speak with was May Lou Collins, one of the persons listed here

who apparently is now in California, and it would not be in my judgment that she would be helpful in this matter in any pertinent degree and that she told me that she did not see the occurrence.

"The Court: Very well. Anyone else you want, Mr. Robinson?

"The Defendant: Well, I asked the attorney yesterday to subpoena Mr. and Mrs. Robert Moore.

"The Court: What do they know about it?

"The Defendant: In whose apartment I was arrested in, I mean arrested near.

"The Court: What will they testify to?

"The Defendant: Well, I do not know, sir, but I would like to have them subpoenaed in court.

"The Court: We can't subpoena people unless you tell us what they are going to testify to.

"The Defendant: Well, the police are contending that the clothes they have found in Moore's apartment was mine. That is the reason at the beginning of the trial, I asked the attorney to have a pretrial preliminary to determine the admissibility and the validity of the evidence that the State was intending to use against me.

"The Court: Let's hear the rest of the evidence and we will decide on that. Let's proceed with the trial.

"Mr. McDermid: May I say for the record, however, that I do not recall him asking me to subpoena the Moores in yesterday, and I think that you will have a chance to talk to Mr. Warren Carey in a few minutes again and he will be able to satisfy you.

"The Defendant: The court was recessed and I asked him to come back and he didn't. He failed to comply.

"The Court: Let's proceed. At the recess for lunch, you can talk to your lawyer then.

"The Defendant: All right."

(R. 126-130.)

Again after the sentence had been pronounced, Robinson had the following colloquy with the court:

"The Defendant: Judge, your Honor, may I say something before you take me out of your courtroom?"

"The Court: Yes, sir.

"The Defendant: As you know, I asked the Court about the witnesses that the State had that appeared—that appeared on the list. My lawyers had previously showed me the witnesses to that extent, and, I have checked the list. I mean I see that the list is mostly police officers. Well, here the police introduced evidence of some clothes belonging to mine and I was told by the Court before going to trial, any time would be needed to subpoena witnesses, that it would be allowed, and the witnesses would be subpoenaed.

"The Court: You have two eminent counsel. They have—

"The Defendant: They must be incompetent or something, Judge, your Honor, still and all if they didn't have the knowledge that they couldn't subpoena the witnesses.

"The Court: The Court is satisfied beyond a reasonable doubt—

"The Defendant: Still and all, may I still say something?"

"The Court (Continuing): —that you killed this woman. Whether those were your clothes or not your clothes, it doesn't make any difference. Take him away. Call the next case.

"You gentlemen did a fine job with what you had. You are lucky you saved his life." (R. 165-166)

In answer, Robinson's attorneys stated for the record:

"Mr. Carey: Judge, I know that the Court is busy. Just a few things as to the statements made by the defendant; at a later date if the record is produced, I would like the record to show that the defendant asked me to subpoena Mr. and Mrs. Moore, that I

have talked to Mr. and Mrs. Moore. They can add nothing to this matter on trial and I showed Mr. Robinson what they told me and at that time he said that he didn't wish them. This was after he had requested the Court for the subpoena.

"The Court: The record will so show.

"Mr. McDermid: I would like the record also to show, your Honor, that I personally have spent much time including perhaps two or three dozen telephone calls to psychiatrists; that I have contacted the Illinois Psychiatric Society and all of its officers requesting assistance in this matter. I have asked Dr. Arieff. His office is on Michigan Boulevard. I have not been able to get an analyst to cooperate and work on this matter, and I do not believe in subpoenaing a psychiatrist to testify when I do not know the degree of cooperativeness that he would display which would be helpful to the cause.

"The Court: The record should show that the case was properly prepared and presented by the two attorneys; that they did everything they could, and they are actually good trial lawyers and officers of the Court." (R. 166-167.)

SUMMARY OF ARGUMENT.

The Court of Appeals for the Seventh Circuit reversed the decision of the District Court and remanded respondent's *habeas corpus* action for a hearing and determination of:

- 1) Whether the respondent was sane at the time of the crime?
- 2) Whether the respondent was denied due process of law by the failure of the trial court on its own motion to impanel a jury and conduct a sanity hearing on the issue of respondent's competence to stand trial.

It is the position of the petitioner that the question of an accused's sanity at the time of the crime is an ultimate question for the determination of the jury and is outside the jurisdiction of a federal court on a *habeas corpus* petition.

It is further contended that the failure of the respondent to raise the issue of his competency to stand trial effectively waived this issue, and that on the basis of the evidence before him there was no duty on the trial judge to hold a sanity hearing on his own motion.

Finally, it is submitted that if a hearing on the issue of the Respondent's sanity at the time of the crime is required it should be held in a state court as should any hearing on the ultimate question of his competency to stand trial.

ARGUMENT.

I.

THE QUESTION OF WHETHER AN ACCUSED WAS INSANE AT THE TIME OF THE COMMISSION OF THE CRIME IS A QUESTION OF FACT FOR THE TRIER OF FACT AND ITS DETERMINATION RAISES NO FEDERAL CONSTITUTIONAL QUESTIONS.

It is contended that the portion of the order of the Court of Appeals for the Seventh Circuit which requires the district to hold an evidentiary hearing on the issue of respondent's sanity at the time of the commission of the crime is improper because such a question is one of fact for the trier of fact and raises no federal constitutional questions. It is, therefore, outside the ambit of the jurisdiction of a federal court on a habeas corpus proceeding involving a state conviction.

It is believed that the instant case is the first in which a federal appellate court has indicated that a state court determination that an accused was sane at the time of the crime in question can be reviewed by a federal court.

On the contrary, all other courts of appeal which have considered the question have ruled that the question of an accused's insanity at the time of the commission of a crime cannot be the basis for a writ of habeas corpus.

In *Taylor v. United States*, 282 F. 2d 16 (1960), the Court of Appeals for the Eighth Circuit in the case of a federal prisoner brought under 28 U. S. C. 2255 ruled that insanity at the time of the crime is not cognizable under that section. This aspect of the *Taylor* case has been cited with approval in the following later cases decided by

the Eighth Circuit: *Burrow v. United States*, 301 F. 2d 12 (1962), *cert. denied* 371 U. S. 894; *Roe v. United States*, 325 U. S. 556 (1963); *Wheeler v. United States*, 40 F. 2d 119 (1965); and *Richards v. United States*, 342 F. 2d 962 (1965).

In *Bishop v. United States*, 223 F. 2d 582 (1955), the Court of Appeals for the District of Columbia the petitioner raised issues as to both his sanity at the time of the commission of the crime and at trial. The court denied both grounds saying with respect to the issue of insanity at the time of the crime, at page 584:

"While Bishop makes some reference to insanity at the time of the commission of the crime which would be a defense to the indictment, this is not the burden of the motion to vacate. The issue of insanity as a defense is presentable upon trial and appealable if error has been made with respect to it, and a motion to vacate under Section 2255 cannot be used as a substitute for an appeal. Therefore, an alleged insanity at the time of the commission of a crime cannot be used as the basis for a motion under Section 2255."

This Court granted *certiorari* and in a *per curiam* decision reported at 350 U. S. 1961 held that "the judgment was vacated and the case remanded to the District Court for hearing on the sanity of the petitioner at the time of his trial." Thus this Court by remanding the case only for a hearing on the issue of the petitioner's sanity at the time of the trial *sub silencio* affirmed the determination that he had no right to a hearing on the issue of his sanity at the time of the crime.

If the issue is not cognizable under 2255, *a fortiori*, it is not cognizable under 2254.

The Court of Appeals for the District of Columbia followed its *Bishop* decision, after the action of this Court,

by rejecting an application by a federal prisoner convicted of five acts of sodomy which alleged that the acts themselves showed they were the product of a mental disease in *Carter v. United States*, 283 F. 2d 200 (1960).

There are also older cases decided by certain other courts of appeal which hold that neither insanity at the time of the crime nor at the time of the trial are cognizable in a federal *habeas corpus* proceeding. To the extent such cases indicate that insanity at the time of the trial is not cognizable, they have in most cases been superseded by later decisions of the circuits involved. It is contended, however, that insofar as they hold insanity at the time of the crime outside the ambit of federal *habeas corpus*, they still represent the law of the circuit in question. Included among these cases are: *Hahn v. United States*, 178 F. 2d 11 (10th Cir. 1949); *Nunley v. United States*, 283 F. 2d 651 (10th Cir. 1960); *Hall v. Johnson*, 86 F. 2d 821 (9th Cir. 1936); *Whelchel v. McDonald*, 176 F. 2d 260 (5th Cir. 1949) aff'd, 340 U. S. 122.

Thus it is submitted that the portion of the order of the Seventh Circuit is in conflict with the law established in at least five different circuits. It is also inconsistent with the decisions of this Court in *Leland v. Oregon*, 343 U. S. 790 and the *Bishop* case, 350 U. S. 961.

In *Leland v. Oregon*, the petitioner was charged with first degree murder. He pleaded not guilty and gave notice of his intention to prove insanity. He was found guilty by the jury. His principal contentions in this Court were that the Oregon statutes which required a defendant to prove his insanity beyond reasonable doubt and which precluded the application of the "irresistible impulse" test deprived him of due process of law. It was held that it was not a violation of due process for a state to adhere

to the McNaughton "right and wrong" test for insanity, nor to require that a defendant prove his inability to know the difference between right and wrong with respect to the conduct in question beyond a reasonable doubt.

If the decision of a state court on the issue of a person's sanity at the time of the crime could be reviewed by a federal court as a question of federal constitutional law, the constitution must require certain tests as to what constitutes insanity and a specification of the burden of proof on the issue. These federal constitutional requirements would then be binding on the states. The question of insanity at the time of the crime would then no longer be a subject on which the various states and federal courts of appeal could adopt different tests. The decision in the *Leland* case which permits the states to adopt different tests for insanity and different rules on the burden of proof on the issue conclusively establishes that this question is not governed by the federal constitution and that it is, therefore, outside the ambit of the jurisdiction of a federal court reviewing directly or by collateral attack the validity of a state conviction.

This conclusion is reinforced by the decision of this Court in *Whelchel v. McDonald*, 340 U. S. 122. In that case the petitioner while on active duty with the army in Germany was convicted by a general court martial for the rape of a German girl. A death sentence was originally imposed but was subsequently reduced to a term of years. On federal habeas corpus the main issue was the insanity of the petitioner at the time of the crime. This Court said at page 124:

"We put to one side the due process issue which respondent presses, for we think it plain from the law governing court martial procedure that there must be afforded a defendant at some point of time an

opportunity to tender the issue of insanity. It is only a denial of that opportunity which goes to the question of jurisdiction. That opportunity was afforded here. Any error that may be committed in evaluating the evidence tendered is beyond the reach of review by the civil courts."

While we do not contend that the scope of federal habeas corpus is the same in cases involving state convictions as in those involving military courts martial, there are close similarities. See *Burns v. Wilson*, 346 U. S. 137, at pp. 140-142. Since this Court has indicated in the *Whelchel* case that the basic demands of due process are met if the opportunity to raise the defense of insanity at the time of the crime is accorded a defendant, it is contended that the same rule should be applicable on habeas corpus from a state conviction.

While "basis fairness" may require that a person not be convicted of a crime committed while he is insane, the same consideration applies with equal force to the proposition that a person should not be convicted for a crime of which he is innocent. Yet the question of ultimate guilt or innocence is left to the jury or trier of fact in a criminal prosecution and due process dictates only that he be given the opportunity to prove his innocence. In like manner the question of a person's mental competency at the time of the crime is a question determined by the trier of fact and there is no more reason why that question should be retried in the context of a federal habeas corpus petition than the question of guilt or innocence. The *Whelchel* case establishes this proposition with regards to courts-martial and it is submitted that the same rule should govern state convictions.

Thus the principle that the question of a person's mental competency at the time of the crime is outside the jur-

isdiction of the court in a federal habeas corpus proceeding is established by the decisions of five circuit courts of appeal; the decisions of this Court in *Bishop v. United States*, 350 U. S. 961; *Leland v. Oregon*, 343 U. S. 790, and *Whelchel v. McDonald*, 340 U. S. 122; and sound logic. Its reaffirmance by this Court in this case is urged.

The Court of Appeals for the Seventh Circuit stated that *Smith v. Baldi*, 344 U. S. 561, establishes that "The conviction by a state court of a person for an alleged crime committed while insane violates due process of law under the Fourteenth Amendment." It is contended that *Smith v. Baldi* does not stand for that proposition.

In the *Smith* case the petitioner had been indicted for murder in a Pennsylvania court. At the arraignment he appeared without counsel. A lawyer in the court room at the request of the judge advised him to plead not guilty. Subsequently, a lawyer was appointed who, together with the district attorney and a judge, agreed that a plea of guilty would be substituted so that the state could present its evidence that the crime was first degree murder and petitioner's counsel could have additional time in which to procure out-of-state evidence that petitioner was insane. The court found he was not insane at the time of the crime or any time thereafter and sentenced him to death.

On appeal the State Supreme Court affirmed the conviction. Subsequently, the denial of a federal habeas corpus petition was affirmed by the Court of Appeals for the Third Circuit. A habeas corpus petition was then filed in the State Supreme Court and was denied and *certiorari* was denied by this Court. A second petition was then filed in the federal district court. It was denied and again the Third Circuit affirmed. *Certiorari* was then granted.

The first question raised and the one which prompted this Court to grant the writ was the question of the effect

of the former denial of the writ of *certiorari* from the State Supreme Court habeas corpus action.

"As the effect of a denial of *certiorari* was then in doubt we granted this petition primarily to determine its effect." *Smith v. Baldi*, 344 U. S. 561 at 565.

After holding that such a denial was "without substantive significance", the Court considered the due process arguments of the petitioner. These appear to be: (1) that State should not have allowed him to plead guilty without first adjudicating the question of his competency; (2) that he should not have been permitted to plead to a capital offense without being afforded the technical services of a psychiatrist; (3) that an insane person cannot be executed, and (4) that the district court committed error in not holding a plenary hearing for the determination of his sanity.

After holding that the first three issues showed no violation of due process, this Court, on the fourth issue, held that there was no need for a plenary hearing under *Brown v. Allen*, 344 U. S. 433, because the question of his sanity at the time of the crime was fully canvassed in the state court proceedings.

Although this determination could be interpreted as a holding that the issue was cognizable on federal habeas corpus but that in that case an evidentiary hearing was not required because the issue had been fully canvassed in the state court proceeding, it is contended that such an interpretation is not required, and in the light of the extensive authority to the contrary should not be adopted. Rather, it is submitted that this aspect of the *Smith* case should be merely interpreted to mean that in light of this Court's finding that the issue had been fairly decided in the state court it was not required to pass on the question of whether the contention itself raised an issue cognizable

on federal habeas corpus. In the absence of an express holding on the jurisdictional question, it should not be implied that this Court intended to overrule the existing contrary authority *sub silencio*. Indeed, the *Bishop* case, 223 F. 2d 585 (1952) rev'd. on other grounds, 350 U. S. 961, and the *Taylor* case, 282 F. 2d 16 (1960) which were both decided after the *Smith* decision was reported, show that at least two courts of appeal have not interpreted it in that manner, and the decision of this Court in the *Bishop* case, 350 U. S. 961, reinforces the correctness of the interpretation of those courts.

In conclusion, it is submitted that the issue of insanity at the time of the crime, like the question of the ultimate guilt or innocence of the defendant, is an ultimate question for the determination of the jury and is outside the jurisdictional scope of inquiry on federal habeas corpus. Therefore, that aspect of the decision of the Court of Appeals for the Seventh Circuit remanding the case to the District Court for a determination of that issue is erroneous and should be reversed.

II.

THE ISSUE OF THE COMPETENCE OF THE RESPONDENT TO STAND TRIAL WAS WAIVED BY THE FAILURE TO RAISE IT AT THE TRIAL COURT, AND THE EVIDENCE PRESENTED TO THAT COURT FAILED TO RAISE A BONA FIDE DOUBT OF SANITY SO THAT THE JUDGE SHOULD HAVE RAISED IT ON HIS OWN MOTION.

The decision of the Court of Appeals for the Seventh Circuit in this case, on the issue of the respondent's competence to stand trial, states:

"The district court should also determine upon the hearing whether Robinson was denied due process by

reason of the failure of the trial court on its own motion to impanel a jury and conduct a sanity hearing upon his competence to stand trial."

The Illinois law on the question of how the issue of competence at the time of trial of a person accused of a crime may be raised was stated by the Illinois Supreme Court in *People v. Shrake*, 25 Ill. 2d 141 at page 143 as follows:

"And while we have held it is the duty and responsibility of a defendant or his counsel to raise the question of whether an accused is sane at the time of trial, (*People v. Cloggett*, 22 Ill. 2d 471; *People v. Maynard*, 347 Ill. 422), we have further held that if, before or during trial, facts are brought to the attention of the court, either by its own observation or by suggestion of counsel, which raise a *bona fide* doubt as to a defendant's present sanity, it becomes the duty of the court not to proceed until a jury has been impaneled and the doubt removed by a sanity hearing."

In the instant case, although it was "the duty and responsibility of the defendant or his counsel to raise the question" of his sanity at the time of the trial, they failed to do so. The respondent was represented by counsel and they clearly were aware of the possibility of raising that issue because the question of his sanity at the time of the crime was raised as his principal defense. This clearly deliberate choice not to interject this issue into his trial must be deemed a waiver of that question. The scope of waiver in federal habeas corpus was recently restated by the Court in *Fay v. Noia*, 372 U. S. 391, at page 439:

"The classic definition of waiver enunciated in *Johnson v. Zerbst*, 304 U. S. 458, 464—'an intentional relinquishment or abandonment of a known right or privilege'—furnishes the controlling standard. If a

habeas applicant, after consultation with competent counsel or otherwise understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state court refused to entertain his federal claim on the merits—though of course only after the federal court has satisfied itself by holding a hearing or by some other means, of the facts bearing on the default.”

Here the respondent, who had the advice of competent counsel, failed to raise this issue with regard to his trial. As previously established, the fact that insanity at the time of the crime was raised establishes that the failure to raise the issue of competence to stand trial was a deliberate choice. Because of the extent to which the respondent participated in the trial himself, this must be deemed his choice as much as that of his attorneys. The reasons which led to this choice are purely in the area of conjecture. Perhaps it was because the respondent knew that if he was successful it would only delay the trial until he was restored to sanity and he would be committed to an appropriate institution until that time; perhaps because he believed he could later be freed on that ground on habeas corpus if he was convicted and therefore he had nothing to gain by raising it; but more likely it was because neither he nor his counsel believed that he was incapable of understanding the charges against him and aiding his counsel in defending against them. Indeed, in this regard it should be noted that his counsel in his closing argument stated that he believed Robinson was at that time having a lucid interval, although he also said that he did not believe his lucidity bore on the question of whether he

was legally sane at the time of the crime or the time of the trial. (R. 162) In any event, his failure to request a sanity hearing clearly was a "deliberate by-passing of state procedures," of which the federal district court was capable of satisfying itself by means of examination of the trial record which was before it at the time of the decision.

But the fact that the respondent waived this issue by his failure to raise it does not completely answer the issue because of the second aspect of the Illinois law on the subject—the rule that the trial judge must raise it on his own motion if he has any *bona fide* doubt on the issue. This is the point on which the Court of Appeals for the Seventh Circuit believed there might have been a denial of due process. Its order remanded the case for a determination if there was a denial of due process "by reason of the failure of the trial court on its own motion to impanel a jury and conduct a sanitary hearing upon his competence to stand trial."

While it is contended that the fact that the respondent failed to raise the issue waived it as a matter of Federal law and that the question of whether under Illinois law the judge should have had a *bona fide* doubt raises no due process issue, it is further contended that even on the basis of Illinois law the facts clearly show no ground on which the trial judge should have had such a *bona fide* doubt.

The only evidence before the trial judge in 1959 in any way indicating the possibility of present insanity was the fact that respondent had once been committed to Kankakee State Hospital as insane in 1951 and the testimony of four lay witnesses who testified they believed him insane and incapable of distinguishing between right and wrong.

However, the medical record from Kankakee stated that the respondent when admitted had been drinking heavily

and described classical symptoms of delerium tremens. He was adjudged fully recovered when he was discharged (R. 164-165, 161).

The gist of the testimony of the lay witnesses was that a brick had fallen on Robinson's head when he was seven and that he acted somewhat peculiar afterwards, that he once kicked a hole in a family bar when he was refused money by his mother, that he frequently was sullen and complained of headaches, that he once had a serious fight with his wife, that he was nervous, that he often walked abruptly from his work, and that he sometimes appeared "glassy-eyed" or in a daze. Clearly, none of this testimony had any bearing on the issue of whether he understood the nature of the charges against him and could cooperate with his counsel.

More serious is the fact that he had killed his child and attempted to commit suicide; however, since he was convicted for this crime in 1953, it follows he was unable to establish that he was insane at that time.

On the other hand, it was stipulated that if Dr. William H. Haines, the Director of the Behavior Clinic of the Criminal Court of Cook County, were called as a witness, he would testify that he had examined Robinson approximately two months earlier and at that time he knew the nature of the charges against him and was able to cooperate with counsel. Furthermore, the extended vis-a-vis colloquies he had with the court gave the trial judge an unusually clear opportunity to evaluate the defendant's demeanor and to see that he was able to understand the charges against him and cooperate with counsel. The Supreme Court of Illinois discussed the effect of the colloquies as follows:

"In the latter respect, the record reflects several instances where defendant displayed his ability to as-

sist in the conduct of his defense in a reasonable and rational manner. Typical instances of when defendant displayed mental alertness, as well as understanding and knowledge of the proceeding, appear in his remarks to the court as follows: 'Your honor, they were on the State's witness list and the State said they have several witnesses. They produced two. For what reason, I don't know, but I am on trial here and I would like to be given every consideration, and I would like the court to be adjourned until tomorrow morning—to give me time to confer with counsel for the calling of witnesses.' Again, when discussing witnesses with the court, defendant said: 'Well, the police are contending that the clothes they found in Moore's apartment was mine. That is the reason at the beginning of the trial, I asked the attorney to have a pre-trial preliminary to determine admissibility and validity of the evidence the State was intending to use against me.'

"Under all the circumstances, we are of the opinion that the court violated no duty, and denied defendant no constitutional right, when it did not, of its own volition require a sanity hearing." *People v. Robinson*, 22 Ill. 2d 162, at page 168, 174 N. E. 2d 820 at page 823.

We contend, therefore, that, if the issue was not fully waived, on the basis of the evidence before him, the trial judge violated no constitutional right of the respondent when he did not, on his own motion, require a sanity hearing.

III.

ANY HEARING REQUIRED ON THE ISSUE OF RESPONDENT'S COMPETENCY AT THE TIME OF TRIAL OR HIS SANITY AT THE TIME OF THE CRIME SHOULD BE HELD IN AN APPROPRIATE STATE COURT.

Under the present concept of federal habeas corpus, state remedies must first be exhausted before the federal court will assume jurisdiction. Once that court does assume jurisdiction, normally all further proceedings until it is determined whether the defendant's constitutional rights have been violated are conducted in a federal court. However, a recent exception to this practice has been established by the decision of this Court in *Jackson v. Denno*, 378 U. S. 368, under which a question relating to the denial of a defendant's constitutional rights is to be remanded for a hearing in the state courts where those courts have not conclusively established the factual questions underlying the asserted denial of constitutional rights. Under this rule the power of a federal court to hold an evidentiary hearing and make an independent factual determination of constitutional issues once decided by a state court is not questioned. Rather it is believed that this new practice is based on the concept of comity which underlies the exhaustion of state remedies' requirement of 28 U. S. C. 2254 (*Fay v. Noia*, 372 U. S. 391, 419-420) and which dictates that a state court should first hold the appropriate evidentiary hearing where there has never been a conclusive factual determination by the state court even though the state remedies may be technically exhausted.

The origin of this concept lies in the opinion of this Court in *Rodgers v. Richmond*, 365 U. S. 534, a federal habeas corpus case involving the validity of a conviction ren-

dered by the state courts. This Court determined that the state trial court had used a test for the determination of the voluntary nature of a confession which was invalid under the Constitution. Rather than remanding the case to the district court for the determination of the voluntariness of the confession, the Court remanded the case to the state court for a retrial of the defendant under an appropriate constitutional standard. The Court said at pages 547-548:

"A state defendant should have the opportunity to have all issues which may be determinative of his guilt tried by a state judge or a state jury under appropriate state procedures which conform to the requirements of the Fourteenth Amendment."

This case in turn provided the basis for *Jackson v. Denno*, 378 U. S. 368, which extended the concept to its present status. The *Jackson* case was also a federal habeas corpus proceeding involving a state conviction, in which the issue was the constitutionality of the New York procedure by which the admissibility of a confession was determined. Under that procedure the judge would make a preliminary determination with regard to the admissibility of a confession. If under no circumstances it could be considered voluntary, it was his duty to exclude it, but if reasonable men could differ on the question, he was required to submit the question to the jury. The Court ruled this procedure unconstitutional and held that there must be an independent judicial determination of the voluntary character of every questioned confession. Since the jury had the question of the admissibility of Jackson's confession left to it for determination, his constitutional rights were violated. This Court ruled that Jackson was not entitled to a new trial but merely to a hearing on the voluntary nature of his confession. If it was not voluntary,

a retrial would be necessary, but if it was, his conviction could stand. Furthermore, it was held that this hearing should be held in the state rather than the federal courts.

The Court said at 378 U. S. pages 373-374:

"It is New York, therefore, not the federal habeas corpus court, which should first provide Jackson with that which he has not yet had and to which he is constitutionally entitled—an adequate evidentiary hearing productive of reliable results concerning the voluntariness of his confession."

Similarly, in the instant case if this Court should rule that Robinson is entitled to either or both of the hearings specified in the order of the Court of Appeals, they should be held in the state courts. On the issue of insanity at the time of the crime, the only state determination on this question was the ultimate decision of the judge, in his capacity as trier of fact, that the respondent was guilty. The Illinois Supreme Court has never fully reviewed the evidence on this point but merely held that he never overcame the presumption of sanity. (*People v. Robinson*, 22 Ill. 2d 162, 179 N. E. 2d 820.) The situation here is very similar to that in the *Jackson* case where the only determination on the issue of the admissibility of the confession was that made by the jury, the ultimate trier of fact in that case.

On the issue of respondent's competency at the time of the trial, if, as indicated by the opinion of the Court of Appeals, this question only goes so far as a determination of whether the trial judge should have granted a sanity hearing on his own motion, the question is somewhat different. That determination could properly be made by the federal district court on the basis of the record. If, however, that court should determine that due process was denied by that failure, then as in *Jackson*, the cause should

be remanded to the state court to hold what was constitutionally required, a sanity hearing. If on such a hearing it is determined that Robinson was sane at the time of the trial, the conviction should stand. If, however, it is determined that he was not competent at that time, a new trial would be required.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals for the Seventh Circuit should be reversed and the order of the District Court dismissing the petition for a writ of habeas corpus should be reinstated.

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Supreme Court of the United States

October Term, 1965

FRANK J. PATE, Warden,

Petitioner.

v.

UNITED STATES ex rel. THEODORE ROBINSON,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 382

FRANK J. PATE, Warden,

Petitioner,

v.

UNITED STATES ex rel. THEODORE ROBINSON,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

A.

Questions Relating To Violations Of Constitutional Rights.

1) On the issue of Robinson's competence to stand trial:

(a) Where Robinson had a long history of mental illness, including a court ordered commitment to a mental

institution; and where four witnesses expressed the opinion that he was insane at the time of the trial, was Robinson denied due process of law by the failure of the trial judge to convene a jury to determine his competency in accordance with state procedure, or by the failure of the trial judge to afford Robinson a fair hearing on this issue?

- (b) Can an insane person "intelligently" waive his right to have his competency to stand trial determined?

2) On the issue of Robinson's sanity at the time of the crime:

- (a) Does fundamental due process prohibit the states from imposing criminal penalties upon acts committed while insane, so that a claim of insanity at the time of the crime is cognizable in habeas corpus?
- (b) Where the state failed to afford Robinson a fair opportunity to present the defense of sanity at the time of the crime, was he denied due process?
- (c) Where the state court did not, "after a full hearing reliably [find] the relevant facts" on the issue of sanity at the time of the crime, may the District Court hold an evidentiary hearing on that issue?

3) Was Robinson denied fundamental due process by the conduct of his trial in an atmosphere of haste which prevented him from obtaining the testimony of important witnesses?

4) Where Illinois requires the state to prove the defendant's sanity as an essential element of the crime once *any* evidence of insanity is introduced, was Robinson denied due process by his conviction when the state failed to produce any evidence that he was sane?

5) Is the sixth amendment right to compulsory process enforceable against the states? If so, did the state court's refusal to subpoena important witnesses specifically requested by Robinson deny him this right?

6) Did the District Court err in failing to appoint counsel for Robinson in that Court?

B.

Questions Relating To Federal-State Relationships In Habeas Corpus Cases.

On the question "whether any of the further proceedings contemplated in the opinion of the Court of Appeals should be conducted in the appropriate Illinois courts rather than in the District Court . . .":

- 1) Do the federal courts on habeas corpus have any power to "remand" a case to the state courts?
- 2) If a violation of Robinson's constitutional rights can be found without further hearings in the District Court, should the state courts be permitted to delay his release by granting him a limited hearing, or must they grant him a complete new trial?

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the Due Process Clause of the fourteenth amendment, set forth in petitioner's brief, this cause involves questions raised under Amendment VI, United States Constitution, which provides in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

STATEMENT

The petitioner's statement of facts is incomplete. Petitioner ignores much of the evidence relating to the conduct of the respondent, Theodore Robinson, at the time of the shooting of Flossie Mae Ward and at the time of his arrest, which evidence was specifically relied upon by the Court below as bearing on Robinson's mental condition.¹ Petitioner totally ignores the evidence relating to the atmosphere of haste in which Robinson's trial was conducted, which the Court below found deprived Robinson of the full and fair trial required by due process.² Petitioner has also ignored or inadvertently misstated some of the most significant historical evidence presented by Robinson on the issue of his mental condition. Under the circumstances a full statement of facts is required.

A.

Robinson's Trial In The State Court.

Respondent, Theodore Robinson, was indicted for murder and brought to trial in the Criminal Court of Cook County, Illinois on September 15, 1959. Robinson, an indigent, was represented by court-appointed counsel. His trial commenced shortly before noon on the 15th and was completed before the close of court on the 16th. Immediately upon the completion of the defendant's closing argument Robinson was found guilty of murder and sentenced to life imprisonment.

¹ See Opinion of Court below, 345 F. 2d at 693-694 (R. 172-173).

² See Opinion of Court below, 345 F. 2d at 692-695 and specifically footnotes 2 and 5 in that Opinion (R. 170-171, 173-174, 176-177).

THE STATE'S CASE.

Robinson concedes that the State's evidence was legally sufficient to prove that he shot and killed Flossie Mae Ward in the restaurant where she was employed in Chicago, Illinois. Robinson's defense was insanity at the time of the shooting. The evidence adduced by the state relating to the shooting of Flossie Mae Ward and the subsequent arrest of Robinson is, however, pertinent insofar as it tends to reveal Robinson's mental condition at that time.

The restaurant where Flossie Mae Ward was shot consisted of a small room, approximately 25 feet square. When Robinson entered the restaurant Flossie Mae Ward was standing behind the long part of an "L" shaped counter, near the front of the restaurant. (R. 52.) Further down the counter, almost at the back of the restaurant, stood two other employees. (R. 64, 73.)

When Robinson entered the restaurant, he walked over to the counter to a position directly opposite Flossie Mae, approximately 4 to 6 feet away from her. He had a gun in his hand. Flossie Mae said "Don't start nothing tonight, Ted." (R. 44, 69.) Robinson remained in this position and stared at Flossie Mae for approximately one full minute. (R. 69-70.) He then walked approximately 20 feet way from her, towards the back of the restaurant, without saying a word. (R. 70-71.) Robinson remained silent for the entire period he was in the restaurant. Although the counter had a gate, Robinson jumped over the counter at a point approximately three feet from the other employees, so that both were between him and Flossie Mae. (R. 73.) He then ran past the others to the front of the restaurant where Flossie Mae Ward was still standing. The witnesses heard shots and saw

Flossie Mae and Robinson jump over the counter and run out the door. (R. 44.) Flossie Mae Ward was found dead on the sidewalk outside the restaurant. (R. 93.)

Later that evening, the Chicago police received information from Robert Moore that Robinson was in Moore's apartment. (R. 80-81.) Three officers, two of them in uniform, proceeded to the Moore apartment. Standing in the hall approximately half-way between the elevator and the apartment was Robinson. Unaware of Robinson's identity, they walked past him without speaking and proceeded to Moore's apartment. The officers conversed with Mrs. Moore for approximately two minutes and learned that Robinson had left the apartment a short time earlier. As the officers turned to leave the apartment they saw Robinson, still standing in the hallway where they had first observed him. Apparently on the basis of Mrs. Moore's description, the officers approached Robinson and asked his name, which he gave to them. Robinson was placed under arrest but appeared confused, and was uncertain as to why he was being arrested. (R. 79-86, 88, 89-92.)

ROBINSON'S AFFIRMATIVE PROOF OF INSANITY.

In support of his defense of insanity at the time of the crime Robinson produced (1) the official record from the Kankakee State Hospital, a state mental institution to which he had been committed; (2) the testimony of four witnesses; and (3) the stipulated testimony of a police officer. This evidence also raised the question of whether Robinson was sane at the time of trial.

Robinson's history of mental illness began at the age of seven or eight, when he was struck on the head by a brick dropped from a third floor window. Robinson's mother testified that this blow knocked Robinson cross-eyed

and that thereafter he acted "a little peculiar" and suffered from headaches. (R. 131.) It appears that the abnormality of his conduct did not become acute for another ten years or so. From that time on, however, Robinson experienced increasingly frequent periods of depression and uncontrollable anger, usually culminating in physical violence. While on leave from the army, Robinson flew into an uncontrollable rage for no apparent reason and kicked a hole in the breakfront in his mother's living room. Afterwards, he stared at his mother without speaking and paced the floor with both hands in his pockets. (R. 132.) The next morning, Robinson's mother called a friend, Alice Moore, to talk to Robinson because his mother believed he was losing his mind. Robinson's mother (R. 132) and Alice Moore (R. 140-41) both testified about this incident at Robinson's trial.

After Robinson was discharged from the army, he kept a "glare" in his eyes and seemed to be lost in himself. He glared and said nothing when his mother attempted to speak to him. (R. 133.) Robinson's unusual behavior was also noticed by his grandfather, William Langham, who testified at the trial. (R. 144.) Mr. Langham employed Robinson to help paint ceilings; on numerous occasions Robinson would suddenly stop working, come down from the ladder and walk out without speaking. He would appear to be in a daze and would be gone for as much as two or three hours, after which he would return, apparently all right. (R. 144.)

In 1951, Robinson lost his mind entirely and was found pacing the floor, saying that someone was after him. (R. 133.) This incident occurred in the apartment of Robinson's aunt, Helen Calhoun. When he arrived at Mrs. Calhoun's house, he expressed the fear that some-

one was trying to kill him, and asked her to get down from where she was washing windows because "they" were trying to get her too. Mrs. Calhoun called Robinson's mother and when she arrived at the apartment, Robinson would not let his mother open the door. He believed that someone was going to shoot him or come in after him. When his mother finally gained admittance to the apartment and went to hug Robinson and to ask him what was wrong, he pushed her back, telling her to stay away because someone was going to shoot him. At that time, he was staring and foaming at the mouth. (R. 133.) The police were called, and when they arrived Robinson once again resisted having the door opened. The police officer who eventually entered immediately concluded that Robinson had lost his mind and ordered Robinson taken to the Hines Hospital, from which he was transferred to the County Hospital in an ambulance. (R. 134.)

After a week's stay in the County Hospital, Robinson was transferred by court order to the Kankakee State Hospital. The medical records of the Kankakee State Hospital, introduced into evidence by stipulation as Defendant's Exhibit Number 3, revealed that when Robinson was admitted in 1952, he was hearing voices and seeing things. The voices threatened him and he imagined someone was outside with a pistol aimed at him. He was extremely frightened and thought he was going to be harmed. The report further revealed that Robinson had been drinking heavily and raised the question of whether or not he was schizophrenic. The examiner, however, concluded that Robinson seemed to have recovered and indicated that he was willing to "give him a try" since his wife was insistent and was "in a pathetic state." (R. 164.) After a stay of approximately six or seven weeks, Robinson was released to the custody of his wife, although his mother believed that he was still insane. (R. 134.)

After his release from the mental institution, Robinson's condition grew progressively worse. On one occasion, Robinson, who had been fighting with his wife, attempted to kick down a door. He then left the room, gathered up his wife's clothes, threw them into the yard, and attempted to set fire to them. (R. 144-45.)

One Sunday in 1953, Robinson, whose wife had separated from him, brought his 18-month old son to Mrs. Calhoun's home and asked to stay there Sunday and Monday nights because he had no other place to go with the child. He was nervous, prancing and staring wildly, and appeared to be sick. He was totally incoherent. (R. 155-56.) The next day, while Mrs. Calhoun was away at work, Robinson shot and killed his son and attempted suicide by shooting himself in the head. (R. 135.) When Mrs. Calhoun returned from her work, she found the baby lying on the floor and called the fire department ambulance. While they were at the hospital, Robinson was brought in for treatment of his head wound. He had a wild look in his eye. (R. 155.) After shooting his child and attempting suicide, Robinson had again tried to take his life by jumping into a lagoon. (R. 148.) Apparently Robinson was arrested when he came to the South Park Street Police Station and told Officer Theodore Davis that he wanted to confess a crime, although there was also evidence that his arrest came when he walked up to a policeman in the park where he had been wandering and asked for a cigarette. (R. 136.)

Robinson was imprisoned for approximately four years for the killing of his 18-month old baby. (This conviction was apparently on a reduced charge, since the minimum sentence for murder in Illinois was then, and still is, 14 years. There are no degrees of murder in Illinois.)

After his release from the penitentiary, Robinson still appeared disturbed and acted abnormally. As a result, his mother went to the 48th Street Police Station and swore out a complaint against him. She told the police that she believed that he was insane and that she wished to have him returned to a mental institution. (R. 136.) As a result a warrant was issued in the summer of 1957 or 1958, but was never served. Thereafter, on an unspecified date shortly prior to the shooting, Robinson's mother had a second warrant issued. (R. 137.) All this time Robinson did not appear to be normal. He would look "starry-eyed" and would pace the floor. Usually he refused to talk at all. He looked extremely depressed and would glare at his mother and refuse to speak to her. (R. 137.) From November of 1957 or 1958 through January of 1958 or 1959 (the record is unclear) Robinson stayed with Mrs. Calhoun at her home. During that time he was extremely nervous. Mrs. Calhoun was quite afraid of him. She did not want him to know of her fears, but always carried some object to bed with her at night to protect herself in case he became violent. (R. 156.)

All of the witnesses who testified for Robinson expressed an opinion as to his sanity. Robinson's mother testified that in her opinion her son was insane and was incapable of distinguishing the difference between right and wrong. In her opinion, Robinson "thinks whatever he does is right." (R. 138.) Mr. Langham, who saw Robinson as recently as three or four days before the shooting of Flossie Mae Ward, testified that Robinson was "giddy." He further testified that Robinson had not "had a good mind" since he returned from the Army, and that in his opinion Robinson was insane and did not know the difference between right and wrong. (R. 146.) Mrs. Calhoun stated her opinion that Robinson was insane

at the time of the crime and the time of the trial, and that she believed that Robinson did not know the difference between right and wrong. (R. 157.) Alice Moore testified that, in her opinion, when Robinson was in his glaring, untalkative moods he was insane and did not know the difference between right and wrong. (R. 142.)

THE STATE'S REBUTTAL.

The state failed to offer a single word of rebuttal evidence on the issue of Robinson's sanity at the time of the crime.

With regard to his insanity at the time of trial, it was stipulated that Dr. Haines, Director of the Behavior Clinic of the Criminal Court of Cook County would testify that he had examined Robinson some three months prior to the trial and that at that time he knew the nature of the charge against him and could cooperate with counsel. (R. 161.)

Robinson's attorneys refused to stipulate that Haines would testify that Robinson was "sane" when he examined him. A colloquy ensued between the State's Attorney and the Court. (R. 161-62):

"Mr. Conley: Your Honor, Dr. Haines is not available now. I proceeded on the assumption after having talked to Mr. Carey that Dr. Haines' testimony to both matters would go in by stipulation. Now, the defense raised here is such that I think we should have Dr. Haines' testimony as to his opinion whether this man is sane or insane. It is possible that the man might be insane and know the nature of the charge or be able to cooperate with his counsel. I think it should be in evidence, your Honor, that Dr. Haines' opinion is this defendant was sane when he was examined.

The Court: Isn't it a fact if Dr. Haines had found him insane, Dr. Haines would report that he could not cooperate with his counsel?

Mr. Conley: That is inferentially true and, therefore, I can't see why they should object.

The Court: You have enough in the record now. I don't think that you need Dr. Haines."

The state then rested. (R. 162.)

CONDUCT OF THE TRIAL.

Robinson's murder trial lasted only from 11:00 A.M. of one day to mid-afternoon of the next. Throughout the trial the judge evidenced impatience with the proceedings and a desire to dispose of the case as quickly as possible. The court refused, on three occasions, to grant short continuances for the purpose of obtaining the testimony of key witnesses. (R. 129-30; 147-48; 161-62.) Twice the court refused requests, one by Robinson and one by the state, for continuances of less than one-half day to obtain the testimony of expert witnesses as to Robinson's mental condition. As a result, no expert testimony was received on the basic issue in the case.

The following colloquies, occurring during the second day of the trial underscore the haste surrounding the conduct of the trial and the calling of witnesses:³

1) After a recess at the close of the State's case and prior to the beginning of the defense, the court indicated that it was ready to resume. Mr. McDermid, one of Robinson's counsel, was to conduct the defense. Mr. Carey, defendant's other counsel, addressed the court:

"Mr. Carey: If the Court please, Mr. McDermid, he is in the hall. I went to get him once. I will bring him in.

³ Most of these colloquies, and others in a similar vein were specifically quoted or referred to by the Seventh Circuit Court of Appeals in its opinion below.

The Court: Let's proceed, please. We have wasted fifteen minutes. We have thousands of indictments waiting for trial. I can't waste fifteen minutes waiting for defense counsel. Let's move."

2) A moment later Robinson indicated a desire to confer with Mr. McDermid:

Mr. McDermid: May I have one minute to satisfy—

The Court: We have wasted eighteen minutes. You must prepare your lawsuit before you come to court. We have been on trial now for a whole day and a half and you have had ample time to talk to your client. Go ahead, talk to him now." (R. 125-26.)

3) Later, Robinson requested that various witnesses who had been present in the restaurant at the time of the shooting be subpoenaed. The following colloquy ensued:

"The Defendant: I would like that the court be adjourned until tomorrow morning.

The Court: No, sir.

The Defendant: To give me time to confer with counsel for the calling of witnesses.

The Court: No, sir. We have been waiting here since 11:00 o'clock waiting for your lawyers. It is now 11:30. We have been on trial for a day and a half." (R. 126-27.)

4) After further discussions, Robinson specifically requested that Mr. and Mrs. Robert Moore be subpoenaed. Robinson had gone to the Moores' apartment after the shooting and had stayed there until shortly before he was arrested in the hall outside their apartment. Testimony relating to these facts and the Moores' report of Robinson's whereabouts had been introduced during the State's case. (A. 80-81, 83.) The following occurred:

"The Defendant: Well, I asked the attorney yesterday to subpoena Mr. and Mrs. Robert Moore.

The Court: What do they know about it?

The Defendant: In whose apartment I was arrested in, I mean arrested near.

The Court: What will they testify to?

The Defendant: Well, I do not know, sir, but I would like to have them subpoenaed in court.

The Court: We can't subpoena people unless you tell us what they are going to testify to." (R. 129.)

5) After three witnesses to Robinson's insanity had testified, it became apparent that, with only one available witness remaining, the defense would be concluded by mid-afternoon. Robinson's counsel informed the court that he wished to call an expert to testify as to Robinson's mental condition and that the doctor would not be available until the following morning:

"Mr. McDermid: Your honor, there is also a doctor from the Psychiatric Institute that we have been trying to get in contact with, and we do feel that we can reach him by the morning. We had hopes of reaching him and having him in here this afternoon.

The Court: When did you try to reach him?

Mr. McDermid: Back prior to July, we wrote and received a letter from the Institute in July, and had conversations at that time.

The Court: The Institute of Illinois?

Mr. McDermid: Yes. It is down at 11th and State Street.

The Court: Did you subpoena him?

Mr. McDermid: I understand it was done but I am not really sure.

The Court: If you subpoenaed him, I will issue an attachment. If you did not subpoena him, we cannot delay the trial. You must prepare your lawsuit be-

fore you go to trial, not during the trial. You are on trial now for two days. Other cases are waiting. We have to proceed. If you subpoenaed him, prepare a petition and I will send for him. If you did not subpoena him, it is unfortunate." (R. 147-48.)

6) The trial proceeded to its conclusion that afternoon without the testimony of any expert witness. The trial court's failure to continue the case to hear the testimony of the state's psychiatrist was noted above. (R. 161-62.)

7) Closing argument was waived by the State, and immediately upon the conclusion of defense counsel's argument the court, without asking if the State wished to present any rebuttal argument, called Robinson to the bench, found him guilty, sentenced him to life imprisonment and ordered him taken away:

Mr. Carey: (Concluding his argument) . . . Those are the only things that I wanted to call to the Court's attention.

The Court: Very well. All right, bring up the defendant, please.

The defendant is found guilty of the crime of murder. He is sentenced to the State Penitentiary for a term of his natural life. Take him away.

The Defendant: Judge, your Honor, may I say something before you take me out of your courtroom?

The Court: Yes, sir.

. . .

(The defendant then protested the court's refusal to permit him to subpoena witnesses and questioned the competency of his counsel.)

"The Court: The court is satisfied beyond a reasonable doubt —

The Defendant: Still and all, may I still say something?

The Court: (Continuing)—that you killed this woman. Whether these were your clothes or not your clothes, it doesn't make any difference. Take him away. Call the next case." (R. 165-66.)

B.

Proceedings After Conviction.

After his conviction, Robinson took an indigent appeal to the Supreme Court of Illinois. That Court affirmed, 22 Ill. 2d 162 (1961). This Court denied certiorari, 368 U.S. 857 (1961).

In April, 1962, Robinson filed his petition for writ of habeas corpus in the District Court. The petition alleged that his constitutional rights were violated in the 1959 state court proceedings. The petition further asserted that Robinson was indigent and unable to retain competent counsel to represent him during the course of the habeas corpus proceeding and requested that counsel be appointed to aid him. (R. 2-3.) On April 13, 1962, the District Court granted Robinson leave to file his petition for writ of habeas corpus *in forma pauperis*. The Court, however, ignored Robinson's request for appointment of counsel. (R. 14.) On April 18, 1962, the petition was dismissed for failure to exhaust state remedies (R. 14.) In 1963, Robinson moved to reinstate the petition and on May 1, 1963, an order was entered by the District Court requiring the state to furnish a transcript of the record in the Criminal Court of Cook County for the purpose of passing on the motion to reinstate. (R. 15.) On May 27, 1963, the District Court vacated its prior order dismissing the petition for failure to exhaust state remedies, reinstated the petition and denied it without hearing, citing only the

opinion of the Illinois Supreme Court in Robinson's direct appeal. (R. 15-16.) On June 12, 1963, a certificate of probable cause was issued and petitioner was granted leave to appeal to the United States Court of Appeals for the Seventh Circuit *in forma pauperis*. (R. 17.)

On appeal the Court of Appeals reversed the District Court's dismissal of the petition for writ of habeas corpus and remanded the case to the District Court for a plenary hearing consistent with its opinion.

On October 25, 1965, this Court granted certiorari to review the judgment of the Court of Appeals. In addition to the questions raised by the petition for writ of certiorari, this Court specifically requested that the parties brief and argue "the question whether any of the further proceedings contemplated in the opinion of the Court of Appeals should be conducted in the appropriate Illinois courts rather than in the District Court."

SUMMARY OF ARGUMENT.

The evidence presented during Robinson's murder trial in the state court showed that he was incompetent to stand trial. Due process prohibits the trial of an insane person on criminal charges. Robinson was thus denied due process by being placed on trial while insane. Illinois law requires that the trial judge convene a jury to determine a defendant's competency to stand trial whenever any doubt arises on that issue. The trial judge, however, failed to conduct a hearing on Robinson's competency to stand trial, and this failure, in light of the overwhelming evidence of insanity, deprived Robinson of due process of law.

Moreover, the trial judge conducted Robinson's trial, on a charge of murder, in an atmosphere of haste, which, as the court below found, was "hardly consistent with the gravity of a capital case and protection of the right to

due process." As a result, Robinson was denied a reasonable opportunity to obtain the testimony of important witnesses on the question of his competency to stand trial, and thus was denied due process.

At the very least, the record fails to show that the state court "after a full hearing reliably found the relevant facts" on the issue of Robinson's sanity at the time of trial. Under *Townsend v. Sain*, 372 U.S. 293 (1963), a plenary hearing in the District Court is required.

Robinson's insanity at the time of the crime was unmistakably proven by the undisputed evidence presented in the state court. Robinson had once been committed to a mental institution by court order. His conduct over a period of many years, and at the time of the crime itself, supported the opinions expressed by four witnesses that he was insane at the time of the crime. Due process prohibits the imposition of criminal sanctions for actions committed while insane. Robinson was thus denied due process.

The atmosphere of haste in which the trial was conducted resulted in denying Robinson a fair opportunity to obtain important psychiatric witnesses. This haste also led the Court of Appeals to find that the state conviction was not supported by the record as a whole, and that the relevant facts were not reliably found in a full and complete hearing. Because due process prohibits the imposition of criminal sanctions for acts committed while insane, and because *Townsend v. Sain*, 372 U.S. 293 (1963), requires a hearing in the federal court when the state has not reliably found the relevant facts, the District Court must conduct a hearing into Robinson's sanity at the time of the crime. The record here amply supports the holding of the Court of Appeals that a plenary hearing on the question of Robinson's sanity was mandatory.

The record of Robinson's trial demonstrates on its face that he was denied fundamental due process by the conduct of his trial as a race against time, resulting in the effective suppression of important testimony. While the Court of Appeals ordered a plenary hearing, it in fact found violations of Robinson's constitutional rights. Accordingly, the writ of habeas corpus should issue, conditioned upon affording the state a reasonable time within which to grant Robinson a new trial.

There are several independent grounds for affirming of the decision of the Court of Appeals:

1) The undisputed evidence shows, on the face of the record, that Robinson was in fact insane at the time of the crime. Moreover, the state failed to introduce *any* evidence to prove an essential element of its case under Illinois law, namely, that Robinson was in fact sane at the time of the crime. The conviction of an accused based on a total lack of evidence as to an essential element of the crime violates due process. Thus, the decision of the court below should be affirmed in part, but modified to provide for unconditional issuance of the writ.

2) Robinson was denied his sixth amendment right to compulsory process by the trial court's refusal to issue a subpoena for important witnesses despite Robinson's specific personal request that a subpoena issue. The right to compulsory process is fundamental, and its denial deprived Robinson of due process. On this ground, the writ should issue, or at least a plenary hearing should be held to determine whether Robinson waived this right.

3) Robinson was denied his Sixth Amendment right to counsel by the District Court's refusal to appoint counsel to represent him in that court. The right to be represented by counsel is applicable to habeas corpus proceedings, at least where the petition is not frivolous on its face.

This Court specifically certified the question whether any of the further proceedings contemplated in the opinion of the Court of Appeals should be conducted in the appropriate Illinois courts rather than in the District Court. The evidentiary hearings ordered by the Court below to determine whether Robinson was insane at the time of the crime, and whether he was denied due process by failure to hold a hearing on his competency to stand trial, can only be held in the District Court. The federal courts have no power in habeas corpus to "remand" a case to the state courts. They must themselves determine whether Robinson's detention violates his constitutional rights, and if they find a constitutional violation, the writ must issue, although Robinson's release may be delayed to afford the state an opportunity to give him a new trial.

The question certified by this Court, however, raises the question of whether the record on its face requires that the writ of habeas corpus issue, conditioned upon affording the state an opportunity to grant Robinson a new trial or hearing. Because the Court of Appeals in fact properly found violations of Robinson's constitutional rights, the writ should have been issued. If the writ is issued, the question presented is whether it would be proper to permit the state to avoid Robinson's release by granting him a limited hearing on sanity at the time of the crime, or sanity at the time of trial, rather than a full new trial. The answer is "No." Robinson would not be afforded his full rights by such limited hearings under the circumstances of this case, and the considerations of "federalism" which led this Court to devise such an order in *Jackson v. Denno*, 378 U.S. 368 (1964), do not exist here. Moreover, the procedure devised in *Jackson* should be re-examined, or at least strictly limited to the peculiar facts of that case.

ARGUMENT.

I.

ROBINSON WAS DENIED DUE PROCESS OF LAW BY THE FAILURE OF THE STATE COURT TO IN- QUIRE INTO HIS COMPETENCY TO STAND TRIAL.

Respondent, Theodore Robinson, asserts that he was denied due process of law by the failure of the state trial court to grant him a full and fair hearing on the question of his competency to stand trial.

A.

There Was Overwhelming Evidence That Robinson Was Insane At The Time Of The Trial.

The evidence adduced at Robinson's trial in the Criminal Court of Cook County provides overwhelming support for his contentions. Four lay witnesses testified that in their opinion Robinson was insane at the time of trial. As the Court below emphasized, these opinions were based upon extensive factual testimony relating to a multitude of concrete examples of insane behavior observed during many years of personal acquaintance with Robinson.

Robinson had a history of twenty-four years of increasingly severe mental disturbances. His mental state fluctuated between moods of deep depression and high elation, the former marked by sullen, angry behavior, pacing the floor, refusing to speak, delusions of persecution, hallucinations and paranoid fears. In the extremes of both moods, but particularly when depressed, Robinson on many occasions had become unpredictable, uncontrollable and

dangerously violent. The undisputed evidence revealed that over a period of years prior to the crime charged, Robinson had destroyed furniture in his mother's home without cause; had walked away from his job in an apparent trance on numerous occasions; and had suffered a complete mental breakdown, marked by paranoid delusions, which resulted in his commitment to the Kankakee State Hospital, a State mental institution, by court order. A psychiatric report of the Kankakee Hospital suggested that he might be schizophrenic.

Although Robinson was released from the hospital supposedly "restored" to competency, the testimony of the witnesses showed that, if anything, these irrational episodes became more frequent and severe in the period after his release. Within a few years he had thrown all of his wife's clothes out of their home and attempted to burn them; shot to death his own 18 month old son; and attempted suicide, both by shooting himself in the head and by jumping into a lagoon. Within a month or two prior to the crime charged, his mother had sought a warrant to have him seized for involuntary commitment to a mental institution as a result of her concern over his deranged behavior. The warrant was never served.

The testimony relating to Robinson's conduct immediately before and after each of the episodes related above shows that on each occasion he was observed to be in the throes of one of his moods of extreme depression or elation. As discussed in more detail in section II, *infra*, the testimony of the state's witnesses about Robinson's conduct at the time of the alleged crime meshed perfectly with the testimony of the defense witnesses and showed that at the time of the shooting Robinson was in one of his typical glaring, uncommunicative, irrational moods of

depression, culminating in violence. Although the foregoing evidence was adduced primarily in connection with Robinson's defense of insanity at the time of the crime and was particularly significant on that issue, it was clearly sufficient to support the opinion of the witnesses that he was insane at the time of trial.

Petitioner contends (pp. 26-27) that Robinson's sanity at trial was revealed by colloquies he had with the trial judge. However, petitioner ignores the fact that these "colloquies" consisted of interruptions, arguments with the court and Robinson's court-appointed counsel, and insults directed at counsel. These colloquies, combined with the direct charge contained in Robinson's *pro se* petition for transcript that his counsel "aided the State to gain his conviction" are entirely consistent with his prior paranoid conduct, and while they may show that Robinson was not unintelligent, they support, rather than negate the contention that he was insane at the time of trial.

The only evidence adduced by the state on the question of Robinson's competency to stand trial consisted of a stipulation that Dr. Haines, Director of the Behavior Clinic of the Cook County Jail, would testify that he had examined Robinson some two to three months earlier and that in his opinion Robinson at that time "knew the nature of the charges against him and was able to cooperate with counsel." This stipulation revealed nothing with regard to Dr. Haines' qualifications as an expert witness, contained no mention of any facts on which his opinion was based, and offered no indication of the length or scope of his examination. Moreover, it related to only one of four issues which, under Illinois law, must be resolved in determining competency to stand trial. In *Pee-*

ple v. Shrake, 25 Ill. 2d 141 (1962), the required standards were stated as follows (25 Ill. 2d at 143):

“When the question of sanity at the time of trial is raised, the issue presented is whether defendant *has the capacity to make a rational defense, sufficient mind to convey necessary information to his attorney or the court*, the capability of understanding the nature of the charges against him and of cooperating with counsel, *and sufficient mind to conduct his defense in a rational and reasonable manner.* (Emphasis added.)

Realizing the inability of the stipulated testimony of Dr. Haines to meet, much less resolve, the substantial question of Robinson’s competency to stand trial, the Assistant State’s Attorney suggested that Dr. Haines, who was not available that afternoon, should be called to testify. Counsel for the state said:

“Now, the defense raised here is such that I think we should have Dr. Haines’ testimony as to his opinion whether this man is sane or insane. It is possible that the man might be insane and know the nature of the charge or be able to cooperate with his counsel.” (R. 166.)

As discussed below (pp. 27-28), Illinois provides a special procedure for determining whether or not a defendant is competent to stand trial in a criminal case. Under Illinois law the court was required, on its own motion, to suspend the trial and convene a jury to determine Robinson’s competency to stand trial if any question of his sanity at the time of trial were raised.

Despite the extensive evidence that Robinson was insane at the time of the trial, and despite the fact that the State’s Attorney himself expressed concern on this issue and felt that further testimony was necessary, the trial

court not only failed to convene a sanity hearing, but refused to continue the case until the next day to hear the live testimony of Dr. Haines, stating:

“You have enough in the record now. I don’t think you need Dr. Haines.” (R. 162.)

This was merely one of a long series of incidents demonstrating that the court was far more interested in a rapid disposition of Robinson’s case than in conducting the full and fair inquiry into his competency to stand trial which due process requires. On numerous occasions throughout the trial, which lasted only a day and a half, the court had chastized Robinson’s counsel for short delays and had urged them to proceed more rapidly. This atmosphere of haste was emphasized by the Court below, with extensive quotation from the report of proceedings in the trial court. See 345 F.2d at 692-94, particularly footnotes 2 and 5 (R. 170-171, 173).

These efforts of the trial court culminated in its refusing to grant Robinson a continuance of less than one-half day to obtain the expert testimony of a psychiatrist from the Illinois Psychiatric Institute, whose presence defense counsel had been unable to secure on September 16, but who would have been available the following morning. (R. 147.) The court stated (R. 148):

“If you subpoenaed him, I will issue an attachment. If you did not subpoena him, we cannot delay the trial. You must prepare your lawsuit before you go to trial, not during the trial. You are on trial now for two days. Other cases are waiting. We have to proceed. If you subpoenaed him, prepare a petition and I will send for him. If you did not subpoena him, it is unfortunate.”

It was indeed unfortunate, for under the incessant urging of the court the trial was concluded that afternoon without the live testimony of a single expert witness on either the issue of Robinson's competency to stand trial or the issue of his sanity at the time of the crime.

On this record the Circuit Court of Appeals reversed the judgment of the District Court (which had denied Robinson's petition without hearing) and remanded this cause to the District Court for a full hearing on Robinson's claim that he was denied due process by the state court's handling of the issue of his competency to stand trial.

B.

The Trial Of A Person While Insane Violates Due Process, And The State Must Provide A Fair Hearing On Sanity At The Time Of Trial.

There can be no question but that the decision of the Court below is amply supported in law, as well as in fact. The most fundamental precepts of criminal law dictate that no man should be tried while insane. 4 Blackstone's "Commentaries" 24. The petitioner concedes that the trial and conviction of an insane man violates the due process clause of the fourteenth amendment. See *Massey v. Moore*, 348 U.S. 105 (1954); *Thomas v. Cunningham*, 313 F.2d 934, 937-38 (4th Cir. 1963).

A person held in custody as a result of a conviction obtained while he is insane is held in violation of his constitutional rights and is entitled to the writ of habeas corpus. *Bishop v. United States*, 350 U.S. 961

(1956); *Frame v. Hudspeth*, 309 U.S. 632 (1940); *Ashley v. Pescor*, 147 F.2d 318 (8th Cir. 1945).⁴

Although the states have some latitude in devising their own procedures for determining a defendant's competency to stand trial, the procedures must be adequate to insure the constitutional right, and the federal courts are obliged to scrutinize the manner in which the state procedures for establishing insanity are implemented. Illinois, by statute, provides that the question of a defendant's competency to stand trial shall be resolved by a jury impaneled for that purpose. Ill. Rev. Stats. (1957) Ch. 38, §§ 592-593. (Since replaced by Ill. Rev. Stats. (1965) Ch. 38, §§ 104-1 to 3). Under this statute, the trial judge is required to interrupt the trial and impanel a jury to inquire into the defendant's sanity if, at any time during the trial of a criminal case, a *bona fide* question is raised as to the defendant's competency. Recognizing that a defendant who is in fact incompetent to stand trial may well fail to raise the issue himself, the law places the duty upon the trial court to impanel a jury, whether the question of sanity is raised by defendant's petition, by the evidence presented, or by the court's own observation.

⁴ In his petition for writ of certiorari petitioner urged that the issue of insanity at the time of trial is "not cognizable" in habeas corpus, and asserted that a split existed among the circuits on this question, citing *Nunley v. United States*, 283 F. 2d 651 (10th Cir. 1961) and other cases from the 10th Circuit. Apparently, however, petitioner now concedes that a claim of insanity at the time of trial raises constitutional questions, cognizable in habeas corpus. He must in light of the holding of this Court in *Bishop* and the fact that the 10th Circuit cases which he relied upon in the petition have been expressly overruled. See *Nunley v. Taylor*, 330 F.2d 611 (10th Cir. 1964).

People v. Bursen, 11 Ill. 2d 360, 368, 370 (1957); *Brown v. People*, 8 Ill. 2d 540, 545 (1956).

If the state effectively denies to a particular accused the established state procedure for raising the insanity issue, he has been denied procedural due process, and the writ of habeas corpus must issue. In *Thomas v. Cunningham*, *supra*, a habeas corpus proceeding arising from a Virginia conviction under facts similar to the case at bar, the Court stated (313 F.2d at 939-40):

"Since due process entitled [petitioner] to have the matter [of competency] thoroughly 'canvassed' and the commonwealth provided the means for it, the federal court is obliged to scrutinize the procedures by which his claim was rejected."

The failure of the trial court to impanel a jury and conduct a hearing on the question of Robinson's sanity, in the face of the substantial doubts on that issue raised by the evidence, and expressed by the State's Attorney himself, clearly amounted to a denial of procedural due process.

Moreover, the atmosphere of haste in which Robinson's trial was conducted, culminating in the denial of a reasonable opportunity to obtain the volunteer testimony of an expert psychiatric witness, of itself deprived Robinson of a full and fair opportunity to develop material facts on the issue of insanity at the time of the trial, and thus constituted a denial of due process, without regard to the specific procedures required by state law.

C.

Robinson Did Not Waive His Right To A Sanity Hearing. The Doctrine Of Intelligent Waiver Can Not Be Applied Where The Evidence Raises The Issue Of Competency To Stand Trial.

Petitioner advances two arguments in support of his contention that the judgment of the Court of Appeals on the issue of insanity at the time of trial should be reversed and the District Court order reinstated. Petitioner argues, first, that Robinson "waived" his right to a sanity hearing; and second, that in any event there was no ground for the trial judge to entertain a *bona fide* doubt of Robinson's competency, and thus no reason for a sanity hearing (Pet. Br. pp. 23-27). Neither contention has merit.

It is inherently contradictory to argue that a defendant who is incompetent to stand trial may nevertheless "waive" his right to have his competency determined. This Court has specifically held, and petitioner concedes, that a waiver of a constitutional right must be a "knowing" or "understanding" and "intentional" relinquishment of a "known" right. *Fay v. Noia*, 372 U.S. 391, 439 (1963). If that requirement has any force at all, it means that the right not to be put to trial in a criminal case while insane, and to have an adequate hearing on that subject in accordance with established procedures, cannot be waived. In rejecting a similar claim of waiver in *Taylor v. United States*, 282 F.2d 16, (8th Cir. 1960) [a case cited in petitioner's brief (p. 15)] the Eighth Circuit Court of Appeals stated (282 F.2d at 23):

"... if one is mentally incompetent, then, by definition, he cannot be expected to raise that contention before the trial court and thus cannot be prejudiced by his failure to do so."

This, of course, is the very reason Illinois law requires the court to convene a sanity hearing whenever a doubt appears, regardless of whether the defendant requests it.

D.

The Record Shows That A Sanity Hearing Was Required.

The contention that there is nothing in the record to cause the trial court to entertain a doubt of Robinson's sanity is, we believe, fully answered by the record itself. Petitioner argues that the factual observations which formed the basis for the opinion of the lay witnesses that Robinson was insane at the time of trial related primarily to events which occurred before his commitment to Kankakee State Hospital and provided no evidence that his mental illness was of a continuing or enduring nature. As the Court below pointed out, this argument totally ignores much of the most significant evidence. Petitioner's reliance on the "evidence of sanity" arising from the colloquies between Robinson and the court during his trial is equally ill-founded. As pointed out above, these colloquies, considering their quarrelsome and suspicious nature, are at least as consistent with a finding of insanity.⁵

⁵ It might also be noted that both petitioner and the Supreme Court of Illinois ignored other statements by Robinson, such as his obvious lack of comprehension of the fact that his case was being defended strictly on a theory of insanity (R. 127, 165), and his statement in his petition for transcript that he thought his trial was merely a pretrial hearing. (R. 26.)

Certainly, as the Court of Appeals found, these colloquies cannot by any stretch of reason so override the extensive evidence of incompetency contained in this record as to justify the trial court's refusal to invoke the required procedures for canvassing the question.

Finally, the petitioner's factual argument wholly fails to meet the finding of the court below that the manner in which the trial was conducted in the state court deprived Robinson of a fair and adequate opportunity to present his evidence and resulted in an insufficient development of material facts.

E.

Robinson Was Denied Due Process By The State's Failure To Afford Him A Fair Hearing On Sanity At The Time Of Trial. The Writ Should Issue.

On the basis of law set forth above and the facts revealed by the record of Robinson's trial in the state court, the Court of Appeals held that a full evidentiary hearing in the District Court was mandatory under *Townsend v. Sain*, 372 U.S. 293 (1963). The Court, therefore, remanded the cause to the District Court for that purpose. On the issue of Robinson's competency to stand trial the Court's order provided:

"The district court should also determine upon the hearing whether Robinson was denied due process by reason of failure of the trial court on its own motion to impanel a jury and conduct a sanity hearing upon his competence to stand trial. If the court finds that Robinson's federal constitutional rights were violated in that respect, he should be ordered released, but such release may be delayed for a reasonable time to be set by the district court to permit the State of Illinois to grant Robinson a new trial." (345 F.2d at 698; R. 180.)

The Court below was clearly correct in holding that the District Court erred in dismissing Robinson's petition for writ of habeas corpus without conducting an evidentiary hearing. Certainly the record reveals a number of the circumstances which this Court in *Townsend* held would require such a hearing. We respectfully submit, however, that the record of Robinson's trial in the state court and the express findings of the Court of Appeals compel the conclusion that the Court of Appeals should itself have ordered the writ issued rather than remanding the case to the District Court for a plenary hearing.^a Robinson's release, of course, could be delayed to give the state an opportunity to afford him a new trial.

It is apparent that the record of a state criminal trial may reveal defects in the state court treatment of a federal constitutional issue which, considered alone, would require the District Court on habeas to conduct a plenary hearing, while at the same time the record reveals, on its face, that

^a As discussed in section V of this brief, the law is clear that the federal courts, in habeas corpus, have no power to "remand" a case to the state court. If a constitutional defect is found in the State proceeding, they must grant the writ, though they may delay the petitioner's release to afford the state an opportunity to re-try the petitioner, or, in a limited class of cases, give him a limited hearing to cure the defect. In view of the foregoing, and in light of this Court's certification, on its own motion, of the question of whether any further proceedings in this cause should be held in the State courts, we presume that we are at liberty to urge the issuance of the writ, rather than a plenary hearing. The question of whether Robinson could be afforded anything less than a new trial in the state court, upon issuance of the writ, is discussed in section V. We believe the answer is "No."

the petitioner has in fact been denied due process with respect to that issue.

On the basis of its examination of the record of Robinson's trial in the state court, the Court of Appeals found:

(1) "Robinson's trial was conducted under an undue preoccupation with hurried disposition in an atmosphere charged with haste, hardly consistent with the gravity of a capital case and protection of the right to due process."⁷

(2) Robinson was denied "... a fair opportunity to obtain volunteer expert testimony from a public agency"⁸ which "... could have weighed heavily on the question of his competency to stand trial."⁹

(3) "[T]he only likely means Robinson had to prove that his 'traits, conduct and crimes' were 'true manifestations' of insanity was the psychiatric testimony he was denied a reasonable opportunity to obtain";¹⁰ and

(4) The Illinois courts had apparently ignored significant testimony from lay witnesses regarding Robinson's irrational conduct before and during the commission of the alleged crime.¹¹

The Court below concluded:

"A review of the record of the state trial persuades us that Robinson was convicted of murder and sentenced to life imprisonment in an unduly hurried trial without a fair opportunity to obtain necessary expert psychiatric testimony in his behalf, without sufficient development of facts on the issues of insanity . . . at the trial, and upon a record which does not show that

⁷ 345 F.2d at 692; R. 170.

⁸ 345 F.2d at 693; R. 171.

⁹ 345 F.2d at 695; R. 176.

¹⁰ 345 F.2d at 696; R. 177.

¹¹ 345 F.2d at 694, 696; R. 174, 177.

the state court 'after a full hearing reliably found the relevant facts'."¹²

We believe that these findings actually constitute a holding that Robinson was denied due process of law by the failure of the state court to afford him a full and fair hearing on the issue of his sanity at the time of trial and by the failure of that court to convene a jury, in accordance with the Illinois procedure, to determine his time-of-trial sanity. Thus, there is no need for further hearings. The writ should issue.

F.

At The Least, A Plenary Hearing In The District Court Is Mandatory.

At the very least the judgment of the Court below, remanding the question to the District Court for a full hearing should be affirmed. It is clear that, on the issue of Robinson's competency to stand trial, "the state factual determination is not fairly supported by the record as a whole; the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing . . . the material facts were not adequately developed at the state-court hearing; . . . [and] the state trier of fact did not afford the habeas applicant a full and fair fact hearing."¹³ As this Court held in *Townsend*, under any one of these circumstances a full evidentiary hearing is mandatory. There is ample support for the ultimate conclusion of the Court of Appeals, which it framed in the language of this Court in *Townsend*, that the record "does not show that the state court 'after a full hearing reliably found the relevant facts.'"¹⁴

¹² 345 F.2d at 697; R. 179.

¹³ *Townsend v. Sain*, 372 U.S. 293, at 313 (1963).

¹⁴ 345 F.2d at 697; R. 179. Quoting from *Townsend*, *supra*, at 318.

II.

THE COURT BELOW CORRECTLY HELD THAT AN EVIDENTIARY HEARING ON ROBINSON'S SANITY AT THE TIME OF THE CRIME WAS MANDATORY.

Robinson was denied due process of law because he was convicted of murder in the state court for acts which occurred while he was insane, and because he was denied a full and fair hearing on his insanity defense.

A. The Evidence Showed That Robinson Was Insane At The Time Of The Crime.

The evidence that Robinson was insane at the time of the shooting of Flossie Mae Ward is convincing and undisputed. The trial court was presented with the opinions of four lay witnesses that Robinson was insane and incapable of distinguishing right from wrong at the time of the alleged crime. As reviewed in detail in connection with the issue of sanity at the time of trial, these opinions were based on the witnesses' personal knowledge of a long series of totally irrational acts by Robinson. The witnesses testified to Robinson's frequent outbursts of violence, his periods of grave depression, his commitment to a state mental institution, the killing of his 18 month old baby, his attempted suicides, and efforts by his mother to have him recommitted to a mental institution a short time prior to the shooting. Further support for Robinson's claim of insanity was provided by the record from the Kankakee State Hospital and the stipulated testimony of Officer Davis with regard to Robinson's suicide attempts.

In light of this testimony, the evidence adduced from the state's witnesses with regard to Robinson's conduct at the time of the alleged crime was particularly significant.

On those occasions when Robinson's behavior had been especially violent, he was described as solemn, morose, uncommunicative, "glassy-eyed," dazed, and irrational. The testimony relating to Robinson's conduct at the time of the shooting and at the time of his arrest provides striking evidence that he was in a similar state when Flossie Ward was killed. As the Court of Appeals noted, the state court apparently ignored this evidence.

Robinson, with gun in hand, entered the restaurant where Flossie Mae Ward was working. He walked to a position directly opposite her and less than six feet away, across a counter. From this position he "glared" at her for a full minute without speaking. Still silent, he walked away from her for a distance of about twenty feet, to the back of the restaurant. He then jumped over the counter (although there was a gate nearby), thus placing two persons between himself and Flossie in the crowded space behind the counter. He then rushed past the two toward Flossie and fired two shots. Although Flossie spoke to him when he entered, Robinson did not speak a word during the entire episode.

The day after the shooting Robinson watched two uniformed policemen emerge from an elevator and pass him in a hall near the Moores' apartment, where he had been since the shooting. Although Robinson was standing near the elevator, and the policemen had not recognized him, he made no effort to escape, but remained there while the policemen stopped at the Moores' apartment and questioned Mrs. Moore. After about two minutes the policemen left the Moores' apartment, walked back towards Robinson, and asked him to identify himself. He did so without hesitation and appeared to have no knowledge of what they wanted with him.

Keeping in mind the undisputed evidence of Robinson's conduct from the time he was a small boy through the time of his arrest, we respectfully call this Court's attention

to the interrelated definitions of paranoid type schizophrenia, manic-depression and schizophrenic reaction, schizo-affective type, collected from the leading texts on mental illness and set forth in Appendix A. Robinson presented a textbook case.

In spite of this evidence, the state failed to offer a *single word* in rebuttal on the issue of Robinson's sanity at the time of the alleged crime.

Under Illinois law, as petitioner concedes, whenever a defendant raises the issue of sanity at the time of the crime and produces *any* evidence in support of that defense, the burden falls upon the state to prove the defendant's sanity beyond a reasonable doubt. *People v. Munroe*, 15 Ill. 2d 91, 98 (1958). Having adopted this standard for testing the insanity defense, the state must, of course, afford it to all defendants. Thus, despite the overwhelming evidence that Robinson was in fact insane at the time of the crime, the state trial court apparently found, and the Illinois Supreme Court in fact held, that Robinson had not adduced *any evidence* which properly bore on the issue of his sanity at the time of the alleged crime. The Illinois Supreme Court found no evidence which it felt indicated that the condition which had caused him to be committed to a mental institution in 1951 was of a "permanent or continuing nature." These findings are completely refuted by the undisputed evidence in the record. As the Court of Appeals reasoned:

"Presumably the Illinois Supreme Court saw little importance in the testimony of Robinson's mother of her unsuccessful attempts to have the police arrest her son so that he could be confined in 1958, or in the testimony concerning Robinson's eccentric behavior in committing the alleged murder. The mother's attempt to have Robinson committed the year before that homicide and his odd antics in the homicide were five and six years after the adjudication of sanity." (345 F.2d at 694; R. 174.)

The undisputed evidence conclusively proves that Robinson was insane at the time of the crime. At the very least, however, it is clear that, in the language of this Court in *Townsend v. Sain*, 372 U.S. 293, 313 (1963):

“... the state factual determination is not supported by the record as a whole.”

B. Robinson Was Denied A Fair Hearing On His Insanity Defense.

As the Court below specifically indicated, if there was any inadequacy in Robinson's proof of insanity at the time of the crime, it was the result of the state court's conduct of the trial as a race against time, culminating in the denial to Robinson of a fair opportunity to obtain the testimony of important witnesses.

Throughout the trial, the judge repeatedly urged Robinson's attorneys to hurry their presentation and berated them for wasting time. The proceedings at the end of the trial were particularly revealing of the court's attitude. In a space of a few minutes he rejected the state's attorney's suggestions that Dr. Haines be called, in effect suggested that the prosecutor not argue his case, and then, after the defense argument, without even asking if the prosecution had any rebuttal argument, called the defendant to the bar, found him guilty of murder, pronounced sentence (without asking for aggravation or mitigation), ordered the defendant taken away, and called the next case.

These and other incidents revealing the court's attitude are described in footnote 2 of the opinion of the Court below. (345 F.2d at 692-93; R. 170-71.)

The most important result of the attitude of the trial court was to deny Robinson an adequate opportunity to obtain the testimony of important witnesses. At the opening of the defendant's case, Robinson himself requested that Mr. and Mrs. Moore be subpoenaed. The trial judge, however, refused Robinson's request, ostensibly on the ground that, because Robinson could not anticipate the testimony of the Moores, he had no right to subpoena them. As the Court of Appeals pointedly observed, however:

"It could be that their observation of Robinson the day following the homicide was material to the question of his insanity the previous night.

* * *

"Without any specification by Robinson, the relationship of the Moores to the case should have been apparent from the testimony concerning Robinson's arrest. They saw Robinson the day after the homicide and could have given testimony of their observation of him, on the question of his insanity at the time." (345 F.2d at 695, 697; R. 175, 179.)

Even more serious was the denial to Robinson of a continuance of less than one-half day for the purpose of obtaining the testimony of an expert psychiatric witness. The facts in regard to this incident have been set forth above. As the Court below indicated, it ill lies in the mouth of petitioner to urge, on the one hand, that Robinson failed to offer any proof that his insanity was of a permanent or continuing nature, while on the other hand supporting the trial court's "denial of a reasonable opportunity to Robinson to obtain psychiatric testimony which could have had substantial bearing upon the very question of Robinson's 'permanent and continuing' mental state." (345 F.2d at 694; R. 174.)

As discussed in section III of this brief, *infra*, we believe that the state court's conduct of Robinson's trial as a race against time so severely impinged upon his fundamental constitutional right to a full and fair trial as to constitute a violation of due process on the face of the record. At the very least, however, the record is more than ample to support the findings of the court below that:

"... Robinson was convicted of murder and sentenced to life imprisonment in an unduly hurried trial without a fair opportunity to obtain necessary expert psychiatric testimony on his behalf, without sufficient development of facts on the issues of insanity at the time of the homicide . . . and upon a record which does not show that the state court, 'after a full hearing reliably found the relevant facts.' " (345 F.2d at 697; R. 179.)

On the basis of these findings the Court below properly held, pursuant to the decision of this Court in *Townsend v. Sain*, *supra*, that the District Court erred in dismissing Robinson's petition without a full evidentiary hearing on the issue of Robinson's sanity.

C. Petitioner Does Not Dispute These Facts And The Findings Based Thereon.

Petitioner, in his brief in this Court, makes no effort to dispute these findings. In effect, he concedes that the state factual determination that Robinson was sane at the time of the crime is "not fairly supported by the record as a whole,"¹ concedes that "the material facts

¹ *Townsend v. Sain*, *supra*, at 313.

(on the sanity issue) were not adequately developed at the state court hearing,"² and concedes that "the state court has not after a full hearing reliably found the relevant facts."³ Nevertheless, petitioner argues, the decision of the Court below must be reversed because the question of Robinson's sanity at the time of the crime "... is one of fact for the trier of fact and raises no federal constitutional questions. It is, therefore, outside the ambit of the jurisdiction of a federal court on a habeas corpus proceeding involving a state conviction." (Pet. Br. p. 15.)

D. The Insanity Defense Raises Fundamental Due Process Questions.

The petitioner's argument is entirely without support, in law or in logic. In fact, petitioner's argument contains internal inconsistencies which reveal its lack of merit. While beginning its argument with the bald proposition that the question of whether Robinson was sane at the time of the crime "raises no federal constitutional issues," petitioner ultimately concedes that "... 'basic fairness' may require that a person not be convicted of a crime committed while he is insane ..." (Pet. Br. p. 19.) This latter statement is clearly correct, yet entirely inconsistent with petitioner's basic premise.

A fundamental notion in any civilized system of criminal law is that a person may not be convicted of a crime for acts committed while insane. Such a conviction violates due process as guaranteed by the fourteenth amendment.

² *Totensend v. Sain*, *supra*, at 313.

³ *Totensend v. Sain*, *supra*, at 318.

As Justice Frankfurter stated, "Ever since our ancestral common law emerged out of the darkness of its early barbaric days, it has been a postulate of Western civilization that the taking of life by the hand of an insane person is not murder." *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 570 (1953) (dissenting opinion).

While the language quoted is from Justice Frankfurter's dissenting opinion, it is apparent that the majority of this Court in *Baldi* also accepted the proposition that the failure of a state to recognize the defense of insanity at the time of a crime, or to afford a defendant an adequate opportunity to sustain it, would violate due process. The only disagreement between the Justices in *Baldi* was whether the defendant there had in fact been denied a full and fair hearing on the issue.

Individual states have twice attempted to abolish the defense of insanity. Neither case reached this Court; on both occasions the state supreme courts themselves invalidated the laws on due process grounds. *Sinclair v. State*, 161 Miss. 142, 132 So. 581 (1931); *State v. Strasburg*, 60 Wash. 106, 110 Pac. 1020 (1910).

Clearly, basic notions of fundamental fairness prohibit a procedure which would withhold from an accused an insanity defense. Such a procedure so departs from "the concepts of ordered liberty" as to "shock the conscience" of civilized persons. *Palko v. Connecticut*, 302 U.S. 319 (1937).

E. Federal Courts Must "Canvass" State Findings As To The Insanity Defense.

Once it is admitted that the states are required by the Constitution to recognize, in some form, the defense of insanity at the time of the crime and that they are prohibited

from invoking criminal sanctions against persons who were insane at the time of allegedly criminal acts, it necessarily follows that the federal courts have the power and the duty to inquire into the circumstances whereby the defendant's insanity claims were rejected. If that inquiry reveals, as it does in this case, that the defendant was denied a full and fair evidentiary hearing in the state court, then the federal courts *must try the facts anew*. The petitioner's proposition that the question of insanity at the time of the crime is "one of fact for the trier of fact" in no way supports his conclusion that it is not cognizable in habeas corpus. Indeed, this Court held in *Townsend v. Sain*, 372 U.S. 293 (1963) that it is precisely in the case where a question of fact is involved in resolving a constitutional issue that the federal courts on habeas corpus may be required to hold an evidentiary hearing, such as was ordered by the Court below in the case at bar. This Court specifically stated in *Townsend* (372 U.S. at 312):

"It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues. Thus a narrow view of the hearing power would totally subvert Congress' specific aim in passing the Act of February 5, 1867, of affording state prisoners a forum in the federal trial courts for the determination of claims of detention in violation of the Constitution. The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary. Therefore, where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew." (Emphasis added.)

This Court held that an evidentiary hearing is mandatory where the facts are in dispute and the habeas applicant did not receive a full and fair evidentiary hearing in the state court. More specifically, this Court enumerated six situations in which an evidentiary hearing in the District Court is mandatory, stating (372 U.S. at 313):

"We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) *the state factual determination is not fairly supported by the record as a whole*; (3) *the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing*; (4) there is a substantial allegation of newly discovered evidence; (5) *the material facts were not adequately developed at the state-court hearing*; or (6) *for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.*" (Emphasis added.)

The Court below found, specifically or by implication, that at least four of these circumstances are applicable to the case at bar. These findings are amply supported by the record of Robinson's trial in the state court. Thus, the Court below was clearly correct in holding that the District Court erred in failing to hold an evidentiary hearing on the question of Robinson's sanity at the time of the alleged crime.

Petitioner offers no reasoning in support of his contrary conclusion other than the specious claim that, since a determination by a federal court that Robinson was in fact insane at the time of the crime would in effect be a determination that he was not guilty of the crime of murder, the federal courts are somehow precluded from exam-

ining the issue, and must suffer Robinson's continued unlawful incarceration by the state despite its failure to afford him a full and fair hearing on the issue of his sanity at the time of the crime. The petitioner's position boils down to the proposition that, while the federal courts may re-examine state court findings on constitutional issues where the claimed denial of due process *may* have contributed to the defendant's imprisonment (as by use of an involuntary confession), they may not examine state findings on constitutional issues if the claimed denial of due process *necessarily* resulted in the defendant's imprisonment. To state the proposition is to defeat it.

F. Petitioner's Authorities Do Not Support His Position.

Just as petitioner's contentions are unsupported by logic, so they are unsupported by relevant and valid authority. Petitioner relies heavily upon *Whelchel v. McDonald*, 340 U.S. 122 (1950). (Pet. Br. 18-19.) In that case the petitioner sought relief by habeas corpus from a general court martial conviction, asserting that he was insane at the time of the alleged crime. This Court found it unnecessary to reach the question of whether denial of the defense of insanity at the time of the crime to a court-martial defendant would violate due process, because the Manual for Courts Martial required the military courts to afford defendants that defense. Furthermore, the record in fact showed that, although petitioner had not even raised the defense at trial, he had been examined and reported to be sane both by the officer investigating the crime and by a neuro-psychiatrist. The Division Staff Judge Advocate had found that the prisoner was not insane, either on a permanent or temporary basis. 340 U.S. at 123-24. This Court, in affirming the Court of Appeal's

denial of the habeas corpus petition, held that only the denial of an opportunity to present the insanity defense would go to the question of jurisdiction of the Court Martial, and that since the record showed an adequate opportunity to present the defense had been afforded, it had no power, as a civil court, to reach any error of the military court in evaluating the evidence. As petitioner seems to concede, *Whelchel* is distinguishable from the case at bar, for one reason, because of the narrower scope of review by civil courts of court-martial proceedings. E.g., *In re Tamashita*, 327 U.S. 1, 8-9 (1946); *United States v. Grimley*, 137 U.S. 147, 150 (1890).

More important, however, the *Whelchel* case is distinguishable: (1) because the Court there specifically based its opinion on the doctrine that habeas corpus lies only to correct constitutional errors which go to the jurisdiction of the convicting courts, and (2) because the Court there found, and the record showed, that the petitioner had been afforded an opportunity to present the defense of insanity at the time of the crime. (340 U.S. at 124.)

Whatever validity it may have in court-martial cases, the doctrine that the federal courts, on habeas corpus, may inquire into alleged violations of constitutional rights only if the claimed violation goes to the "jurisdiction" of the convicting court, and that thus there may be no inquiry into the factual findings of a court of competent jurisdiction on constitutional issues, has no present validity in cases involving habeas corpus from state court convictions. Indeed, as this Court pointed out in *Fay v. Noia*, 372 U.S. 391, 404-12 (1963), the theory that habeas corpus will not lie to review errors not going to the jurisdiction of the convicting court has always been largely a legal fiction. Certainly it is clear from *Townsend* and *Fay v.*

Noia that if the Constitution requires that a state court defendant be afforded the defense of insanity at the time of the crime, the federal courts have a duty, on habeas, to inquire into the circumstances under which the insanity defense was rejected, and to hold a plenary hearing on that issue if deemed necessary under the standards laid down by *Townsend*.

Furthermore, the implication of *Whelchel* that the Constitution would at least require that a defendant have an *opportunity* to present the sanity defense actually supports the decision of the Court below in the case at bar. Petitioner apparently reads the requirement of an "opportunity" as excluding any requirement that the opportunity be "adequate". Such a reading is entirely unjustified. This Court, in dealing with substantial constitutional rights, has never held that mere form is sufficient where substance is lacking. Clearly, if the Constitution requires that the insanity defense be recognized and afforded to a defendant, this requirement cannot be circumvented by denying the defendant an *adequate* opportunity to present it. The record here shows, and the court below specifically found, that Robinson was denied an adequate opportunity to prove his insanity by the state trial court. The opposite was true in *Whelchel*.

Petitioner's reliance on *Leland v. Oregon*, 343 U.S. 790 (1952) (Pet. Br. 17-18) is equally misplaced. Petitioner claims *Leland* shows that the Constitution does not require the states to recognize the defense of insanity at the time of the crime and thus that rejection of this defense raises no federal constitutional issues and is not cognizable in habeas corpus. Petitioner reaches this conclusion from the fact that this Court in *Leland* held that the states were free to adopt the M'Naghten test of insanity and

to require defendants who would raise the defense to bear the burden of proof beyond a reasonable doubt. Petitioner argues that, since the states are free to adopt different tests of insanity, and different standards of proof for asserting it, the defense of insanity at the time of the crime is not guaranteed by the Constitution, so that the states would be free to abolish the defense altogether.

In fact, of course, petitioner's argument is a *non-sequitur* and *Leland* is irrelevant to the issues of this case. The fact that the states may be free to adopt different standards and procedures with regard to determining an issue does not mean it is not a "constitutional issue." For example, the states are still afforded great latitude in devising their own tests and methods of determining the question of sanity at the time of trial, an issue which the petitioner concedes is "constitutional" and cognizable on habeas corpus. Similarly, in the area of coerced confessions, the states were afforded substantial latitude in devising their own procedures for testing confessions long after this Court held that the use of a coerced confession in a state criminal trial violated due process, although expanding concepts of due process have gradually caused this Court to limit the state's latitude in the confession area (e.g., *Jackson v. Denno*, 378 U.S. 368 (1964)). Similarly, today this Court might well reach a different result in *Leland* on the question of whether the state may constitutionally impose the burden of proving insanity beyond a reasonable doubt upon the defendant,⁴ but that is not

⁴ This question is not likely to arise, since Oregon, the only state which imposed such a burden when *Leland* was decided, has since amended its statute. Oregon Rev. Stats., Ch. 136, § 136.90, as amended, ch. 380, § 1 (1957).

relevant to the issue of whether the constitution requires the states to recognize the insanity defense in some form and prohibits the conviction of a defendant for acts committed while insane.

Furthermore, as pointed out above, the adoption by a state of a standard for determining an issue which meets or exceeds the standard required by the Constitution neither relieves the state of the obligation to afford each defendant the protection of the standards it has freely adopted, nor permits it to deny a defendant an adequate opportunity to present the issue in accordance with those standards. Procedural due process requires the state to give a defendant an adequate opportunity to present the insanity defense in accordance with the tests and procedures adopted by the state. Under *Townsend* the federal courts on habeas must examine the state findings and hold a plenary hearing if, as in the case at bar, the defendant was denied a full and fair hearing.

Petitioner asserts that this is the first case in which it has been indicated that the federal courts may hold a plenary hearing on the question of whether a state prisoner was insane at the time of the crime. On the contrary, even the 8th Circuit, upon whose decisions the petitioner heavily relies, has ordered such a hearing. See *Mitchell v. Henslee*, 332 F.2d 16, 18-19 (8th Cir. 1964).

Moreover, the courts of appeals cases cited by petitioner all involve federal rather than state prisoners. In most cases, §2255 relief was held not available to raise the issue of insanity at the time of the crime solely because the federal prisoners had failed to appeal. These cases simply stand for the proposition, not relevant to this case, that collateral proceedings cannot be used by federal prisoners as substitutes for appeal. *Taylor v. United States*, 282

F.2d 16 (8th Cir. 1960); *Bishop v. United States*, 223 F.2d 582 (D.C. Cir. 1955), *vacated on other grounds*, 350 U.S. 961 (1956); *Hall v. Johnston*, 86 F.2d 820 (9th Cir. 1936). Under the theory of these cases, an insanity defense should be considered on appeal, and failure to raise it on appeal waives any right to raise it in collateral proceedings. The issue of insanity at the trial, however, has been held not to be waived by failure to raise it at trial or on appeal, because an insane prisoner cannot knowingly "waive" such an issue. Thus, §2255 relief would lie in this instance. See, e.g., *Taylor v. United States*, 282 F.2d 16, 21-23 (8th Cir. 1960). The theory of "waiver" of the issue of the defense of insanity at the time of the crime by failure to appeal espoused by these cases can be seriously questioned since *Fay v. Noia*, 372 U.S. 391 (1963) and *Sanders v. United States*, 373 U.S. 1, 12, (1963), but in any event there is no issue of waiver of that defense here.

In two cases cited by Petitioner, *Hahn v. United States*, 178 F.2d 11 (10th Cir. 1949), and *Hall v. Johnston*, 86 F.2d 820 (9th Cir. 1936), the refusal to review insanity at the time of crime was premised on the now discredited theory that collateral attacks would lie only against judgments rendered without jurisdiction. (See argument, *supra*, p. 46).

Several other cases cited by petitioner summarily adopt the questionable rationale of the *Taylor* and *Hahn* cases. *Richards v. United States*, 342 F.2d 962 (8th Cir. 1965); *Burrow v. United States*, 301 F.2d 442 (8th Cir. 1962); *Nunley v. United States*, 283 F.2d 651 (10th Cir. 1960). The case of *Roe v. United States*, 325 F.2d 556 (8th Cir. 1963) made no finding whatsoever as to insanity at the time of crime. The petitioner there only raised the issue

of competency to stand trial. In *Wheeler v. United States*, 340 F.2d 119 (8th Cir. 1965), §2255 relief was denied because the petition was patently frivolous; the question of insanity was raised solely by a flat assertion of insanity, with no facts in the record cited for support.

Those cases which cite the *Taylor* decision (*Burrow, Roe, Wheeler, Richards*) do so in a most perfunctory manner. As was earlier mentioned, *Taylor* rests on the premise that federal prisoners should properly exhaust appeal procedure, and that collateral attacks cannot be substituted for such procedure. None of these cases discusses the constitutional issues raised by inadequate state fact findings as to an insanity issue. Nevertheless, even if these decisions stood for the broad proposition for which they are cited, and assuming without conceding that these decisions still have some validity, since *Townsend* and *Fay*, in § 2255 cases it is clear from the very language of the *Bishop* decision quoted by petitioner that they have no validity in determining the limits of federal court jurisdiction in habeas on application by state prisoners. The Court of Appeals in *Bishop* stated (223 F.2d 582, 584; Pet. Br. p. 16):

“The issue of insanity as a defense is presentable upon the trial and appealable if error has been made with respect to it, and a motion to vacate under Section 2255 cannot be used as a substitute for an appeal. Therefore an alleged insanity at the time of the commission of a crime cannot be used as the basis for a motion under Section 2255.” (Emphasis added.)

It is clear that if this language is intended to do anything more than apply the doctrine of exhaustion of remedies and waiver to §2255 cases, it cannot be applicable to state convictions, for virtually every case which this Court has decided on application for habeas corpus by a state

prisoner has involved an issue which is "presentable upon trial and appealable if error has been made with respect to it." There may be some logic in refusing to permit a federal prisoner to re-raise, under §2255, an issue which the same federal courts determined, or could have determined, on trial and direct appeal. On the other hand, the very purpose of affording a state prisoner the remedy of federal habeas corpus is to enable him to test in the federal courts the constitutionality of procedures which the state courts, on trial and appeal, have upheld. *Fay v. Noia*, 372 U.S. 391, 422-24 (1963).

We have never contended that the decision of this court in *Smith v. Baldi*, 344 U.S. 561 (1953), constitutes an express holding that the state court conviction of a defendant who was insane at the time of the alleged crime would raise an issue which is cognizable in habeas corpus. Nevertheless, contrary to petitioner's suggestion (p. 22), this Court did not decide the jurisdictional point in *Baldi sub silencio*. This Court expressly reviewed the habeas corpus petition of a state prisoner which alleged he was deprived of due process because the question of his sanity at the time of the crime was not adequately "canvassed" by the state court. This Court held, however, that in the particular state proceedings involved in *Baldi*, the issue of insanity had been sufficiently canvassed. (344 U.S. at 570.)

Obviously, this Court never would have decided the question on its merits if it entertained any question of its jurisdiction to consider the issue on petition for writ of habeas corpus. The *Baldi* case clearly repudiates petitioner's illogical and unsupported assertion that the defense of insanity at the time of an alleged crime is "not cognizable" in federal habeas corpus. Certainly the illogical and concededly *sub silencio* implication which peti-

tioner purports to draw from the *per curiam* remand order in *Bishop v. United States*, 350 U.S. 961 (1956) (Pet. Br. p. 16) cannot displace the clear implication of the *Baldi* decision, or the express holding of *Townsend v. Sain* that the federal courts must review state fact finding procedures where constitutional rights are involved.

Basic concepts of fundamental fairness in the administration of criminal justice require that the states afford the defense of insanity at the time of the crime to criminal defendants, and procedural due process requires that each defendant be afforded an adequate opportunity to present this defense in accordance with the state-adopted tests and procedures. This being so, the reasoning of *Townsend* clearly requires the conclusion that, as in the case of any other constitutional issue, the federal courts have the right and the duty on habeas corpus to examine the basis for the state court's rejection of the claim of insanity and to try the facts anew if it appears that the state findings are not fairly supported by the record as a whole, or that the state failed to find the relevant facts after a full and complete hearing.

III.

ROBINSON WAS DENIED A FULL AND FAIR TRIAL IN THE STATE COURT IN VIOLATION OF HIS FUNDAMENTAL RIGHT TO DUE PROCESS.

As demonstrated above, there is no merit to petitioner's contention that the issue of Robinson's sanity at the time of the crime has no constitutional significance and hence is not cognizable in habeas corpus. But even if petitioner's position were well taken, it provides no basis for reversal of the judgment below, for it is clear that fundamental

concepts of due process require the state to afford criminal defendants an adequate opportunity to present witnesses in their behalf in support of any defense recognized by the state, regardless of whether the Constitution would *require* the state to recognize that defense. Robinson was denied a fair trial by the failure of the state to afford him a fair opportunity to present important witnesses on the issue of his sanity at the time of the crime, an issue which Illinois concededly recognizes, whatever its federal constitutional significance.

The record of Robinson's trial in the state court conclusively demonstrates, as the Court of Appeals found, that "Robinson's trial was conducted under an undue preoccupation with hurried disposition in an atmosphere charged with haste, hardly consistent with the gravity of a capital case and protection of the right to due process."¹

As a result, Robinson was denied an opportunity to obtain the testimony of two witnesses (the Moores) who had observed him during the period immediately after the homicide, and who "... could have given testimony of their observation of him, on the question of his insanity at the time."²

More important, another result of the haste with which the trial was conducted "... was denial to Robinson, an indigent represented by court-appointed counsel and obviously without funds to pay for expert psychiatric testimony, of a fair opportunity to obtain volunteer expert testimony from a public agency."³ The Court below found

¹ 345 F.2d at 692; R. 170.

² 345 F.2d at 697; R. 179.

³ 345 F.2d at 693; R. 171.

that this testimony was crucial to Robinson's defense of insanity at the time of the crime and observed that:

"... the denial of a reasonable request to obtain the services of a necessary psychiatric witness is effectually a suppression of evidence violating the fundamental right of due process." (345 F.2d at 695; R. 175.)

The principle that the denial of a reasonable opportunity to secure the testimony of an important witness of itself constitutes a denial of due process is perhaps best stated in *MacKenna v. Ellis*, 280 F.2d 592 (5th Cir. 1960), *modified*, 289 F.2d 928, *cert. denied*, 368 U.S. 877 (1961). In that case defendant, an indigent person represented by court-appointed counsel, was denied his personal request that his case be continued for one day for the purpose of obtaining witnesses. Defendant represented to the court that if the continuance were granted he would be able to produce witnesses who were important to his defense. As a result of the court's denial of his request defendant was left without any evidence to corroborate his alibi. (Just as defendant here was left without any expert testimony on his defense of insanity.) The court stated (280 F.2d 603, 604):

"...[T]he opportunity of an accused to meet the prosecution's case with the aid of witnesses is historically and in practice fundamental to a fair trial. *Powell v. Alabama*, 287 U.S. 45 (1932).

"And the denial of the continuance has bearing here only in a 'but for' sense: but for the refusal of the continuance, MacKenna might have had a fair trial. The question is whether MacKenna had any trial. There is no trial without due process.

"The Court has an 'alert deference' to the judgments of state courts and scrupulously avoids unwarranted

federal intrusions into state procedures. . . . But MacKenna's request for habeas corpus is properly before us. On the record as we read it, MacKenna did not have his day in court to meet the prosecution's case. A fair chance for an accused person to say his say is so rooted in the traditions and conscience of our people as to be 'of the very essence of a scheme of ordered liberty.' "

See also *Brady v. Maryland*, 373 U.S. 83 (1963).

The record of Robinson's trial in the state court conclusively shows that he was denied his fundamental constitutional right to a fair trial by the atmosphere of haste in which his trial was conducted, and especially by the denial of a reasonable opportunity to obtain crucial witnesses. We submit that the findings of the Court below on this issue, as set forth above, in effect constitute a finding that due process was denied, and that these findings are amply justified by the record. Thus, the judgment of the Court below reversing the denial of Robinson's petition for habeas corpus should be affirmed, but should be modified to provide that the writ of habeas corpus issue and that Robinson be released unless, within a reasonable time, the state grants him a new trial.

IV.

THE DECISION OF THE COURT BELOW IS SUPPORTABLE ON SEVERAL INDEPENDENT GROUNDS.

- A. The Undisputed Facts Show That Robinson Was Insane At The Time Of Crime, Or At Least That The State Failed To Introduce Any Evidence On This Issue And Thus Failed To Prove An Essential Element Of The Crime.**

The evidence presented to the trial court conclusively demonstrated that Robinson was insane at the time he com-

mitted the alleged crime. Since the Constitution forbids the conviction of a man for acts committed while insane, it follows that Robinson must be released upon an unconditional grant of the writ of habeas corpus. No purpose would be served by remanding this case to the District Court to make further findings on the question of insanity since the record conclusively establishes this fact.

Moreover, even if the defense of insanity at the time of the crime were not "constitutionally protected," the record here demonstrates that Robinson must be released because of the state's failure to prove an element of the offense charged. Robinson's conviction under such circumstances violates due process.

Illinois law is clear that once any evidence of insanity is introduced at a trial, the so-called "presumption" of sanity vanishes, and the state must then prove beyond a reasonable doubt that the defendant was sane at the time of the alleged crime. *People v. Munroe*, 15 Ill. 2d 91, 98 (1958); *People v. Cochran*, 313 Ill. 508, 523-24 (1924); *People v. Witte*, 350 Ill. 558, 569 (1932). This "presumption" is not evidence of sanity, but only serves as a procedure for requiring the defendant to proceed first in raising the question, so that the State does not have to prove sanity if it is not an issue. *E.g.*, *People v. Munroe*, *supra*, at 98.

As has been indicated, the record here shows clear evidence of Robinson's insanity at the time of the allegedly criminal acts. Yet the State failed to offer a single word of evidence on that issue. Where the state fails to produce any evidence to prove a fact which state law requires it

to prove as a necessary element of the crime charged, the constitutional right to due process of law as guaranteed by the fourteenth amendment is denied. *Garner v. Louisiana*, 368 U.S. 157 (1961); *Thompson v. City of Louisville*, 362 U.S. 199 (1960). Robinson was thus denied due process, and is entitled to an unconditional writ of habeas corpus. While the Court below apparently rejected this contention, it is amply supported in law and fact, and provides an independent reason, not only for affirming the reversal of the District Court's denial of the writ, but for modifying the judgment below so that the writ issues.

B. The Trial Court's Refusal To Permit Robinson To Summon Material Witnesses Violated His Sixth Amendment Right To Compulsory Process.

During the second day of his trial Robinson requested that the trial be continued until the following morning so that he could confer with his attorneys about the calling of witnesses. After this request was denied, a colloquy ensued with the Court, in which Robinson specifically requested that a subpoena be issued for the Moores. Robinson had been present in the Moores' apartment the morning after the shooting, and they had caused and witnessed his arrest. The gun used in the shooting was found in their apartment in clothing allegedly belonging to Robinson. Officer Starr had even testified to conversations with the Moores during the state's case. Most important, the Moores obviously could have given important testimony of their observations of Robinson which would have presented a clearer picture of his mental condition at the time of the alleged crime. Nevertheless, Robinson's request that the Moores be subpoenaed was abruptly denied, the trial court saying, "We cannot subpoena people unless you tell us what they are going to testify to."

On the basis of this evidence, Judge Kiley¹ reasoned that Robinson's right to compulsory process had been denied him. (395 F.2d at 696-97; R. 178-179):

"In the wake of *Gideon v. Wainright*, 372 U.S. 335 (1963), holding that the Sixth Amendment right to counsel is embraced in the Fourteenth Amendment to protect that right against state action, it follows that the right of compulsory process must similarly be included in the Fourteenth Amendment protection. This right is as 'implicit in the concept of ordered liberty' as the right to counsel. In many cases unless a defendant had the opportunity to compel witnesses to appear in his behalf, the right to counsel would be meaningless. Unreasonable denial of a continuance to afford the defendant a timely opportunity to obtain witnesses by compulsory process was held to be a violation of this constitutional right in *Paoni v. United States*, 281 Fed. 801 (3rd Cir. 1922). And this basic right to process can be understandingly waived only by a defendant, not by his attorney. *Cf. Fay v. Noia*, 372 U.S. 391, 439 (1963)."

In a footnote Judge Kiley also cited *Pointer v. Texas*, 380 U.S. 400 (1965), decided after the opinion was first written, as further evidence that sixth amendment guarantees are to be made applicable to the states. In that case this Court held that the sixth amendment right to confront witnesses is applicable to the states.

Judge Kiley then emphasized that Robinson was not required to inform the trial court what the Moores' testimony would be. Its relevancy should have been apparent from the testimony concerning the arrest. Robinson had protested that his attorneys had been requested to subpoena the Moores. His attorneys said that they did not remember such a request. At the conclusion of the trial, Robinson

¹ Judge Schnackenburg dissented from this portion of Judge Kiley's opinion; thus, the Court of Appeals rejected this contention as a separate ground for issuance of the writ by a 2-1 vote.

again protested the failure of the court to issue a subpoena for the Moores. After Robinson had been ordered taken from the courtroom, one of his attorneys, in defending against Robinson's assertion that his counsel were incompetent for not seeking to subpoena the Moores sooner, indicated that Robinson had agreed that the Moores should not be called. But, as Judge Kiley reasoned, "If, as alleged by Robinson, he immediately upon learning that his attorneys had failed to subpoena Mr. and Mrs. Moore as he had instructed them, requested that they be subpoenaed, and if he did not later understandingly abandon his desire to have them called, then his constitutional right was violated."

Judge Kiley's reasoning on this issue is clearly correct. The right to compulsory process is so fundamental that it must be applied to the states. A trial court has no right to require the defendant to explain the relevancy of the testimony of his witnesses before affording him that plain and unqualified protection. The record shows that Robinson was denied that protection. On this ground alone, the writ should issue.

Robinson did not waive this right. The record shows that he steadfastly asserted it up to the moment he was led from the courtroom. If the court has any doubt on this score, however, at the very least the case should be remanded to the District Court to determine on plenary hearing whether Robinson knowingly abandoned this basic constitutional right.

C. The District Court's Failure To Appoint Counsel To Represent Robinson At The District Court Level Violated His Sixth Amendment Right To Court-Appointed Counsel.

When Robinson petitioned for habeas corpus *in forma pauperis* he requested that counsel be appointed to assist

him. (R. 2.) The District Court granted Robinson leave to proceed *in forma pauperis*, but failed to appoint counsel to represent him. (R. 15-16.) This error in itself requires that the case be remanded to the District Court, with instructions that the Court appoint counsel to represent Robinson in the presentation of his claims.¹

As early as 1937 this Court announced the principle that an accused "requires the guiding hand of counsel at every step in the proceedings against him." *Johnson v. Zerbst*, 304 U.S. 458, 463 (1937). In *Gideon v. Wainwright*, 372 U.S. 335 (1963), this Court recognized that the right to court-appointed counsel is of such a "fundamental nature" as to be made obligatory on the states by the fourteenth amendment.

This Court has also made it clear that the right to counsel, being essential to the protection of the rights of criminal defendants, is not confined to the actual trial of an accused, but begins with the commencement of the accusatory process. *Escobedo v. Illinois*, 378 U.S. 478 (1964). It is not surprising in light of the constant broadening of the right to counsel to meet the recognized needs of criminal defendants that this right has been extended to habeas corpus applicants. See *Campbell v. United States*, 318 F. 2d 874 (7th Cir. 1963); *Milani v. United States*, 319 F. 2d 441 (7th Cir. 1963).

In *Fay v. Noia*, 372 U.S. 391 (1963), this Court emphasized the historical importance of the writ of habeas corpus, pointing out that "there is no higher duty than to main-

¹The Court of Appeals did not reach this issue, since it found that a plenary hearing was mandatory. The Court did, however, require the District Court to appoint counsel to act for Robinson at the plenary hearing, thus indicating the belief that it was error not to do so in the first instance.

tain it unimpaired." 372 U.S. at 400. Clearly this duty cannot be met if indigent habeas petitioners are to be denied the assistance of counsel in presenting the often complex constitutional issues which arise on habeas. Moreover, the appointment of counsel would materially aid the District Courts themselves in determining which cases require a plenary hearing, which may be denied without hearing and which require that the writ issue without further hearing.

It is no answer to say that habeas corpus is a "civil" action. In *Smith v. Bennett*, 365 U.S. 708, 712 (1961), this Court observed that "The availability of a procedure to regain liberty lost through criminal process cannot be made contingent upon a choice of labels." Since a habeas corpus petitioner may regain liberty once lost through the criminal process, only a tyranny of labels could classify such a proceeding as "civil" solely to deny to the applicant the assistance of counsel and thus frustrate the high duty of the federal courts to maintain the writ of habeas corpus unimpaired.

V.

THE FURTHER PROCEEDINGS ORDERED BY THE COURT OF APPEALS CAN ONLY BE HELD IN THE DISTRICT COURT. HOWEVER, A PLENARY HEARING IN THE DISTRICT COURT COULD PROPERLY BE AVOIDED BY ISSUANCE OF THE WRIT SUBJECT TO AFFORDING THE STATE A REASONABLE OPPORTUNITY TO GRANT ROBINSON A NEW TRIAL.

In its grant of certiorari this Court specifically requested that the parties brief and argue "the question whether any of the further proceedings contemplated in the opinion of the Court of Appeals should be conducted in the ap-

propriate Illinois courts rather than in the District Court." Clearly the evidentiary hearing ordered by the Court below to determine whether Robinson was insane at the time of the crime, and whether he was denied due process by failure to hold a hearing on his competency to stand trial, can properly be held only in the Federal District Court. The federal courts on habeas corpus have no power to "remand" a case to the state court. They must issue the writ, or deny it.

Certification of this issue, however, raises the question of whether the judgment of the Court below should be modified to provide that the writ should issue conditioned upon the failure of the state to retry Robinson or grant him a hearing within a reasonable time. If such a conditional release is ordered, we submit that the only appropriate procedure in the state court under the circumstances would be a complete new trial. Robinson's rights would not be protected by a limited hearing in the state court.

A. The Federal Courts On Habeas Corpus Have No Power To "Remand" This Case To The State Court For Further Proceedings.

Petitioner suggests that this Court should "remand" Robinson to an Illinois court for the evidentiary hearings which the Court of Appeals held should take place in the Federal District Court (Pet. Br. p. 30). The federal courts, however, have no power, in a habeas corpus proceeding, to "remand" a case to the state court to decide federal constitutional issues. They must themselves determine whether the imprisonment violates a prisoner's constitutional rights. Petitioner misapprehends the function of the writ of habeas corpus and the power of the federal courts in regard to the writ. He misinterprets *Jackson v. Denno*, 378 U.S. 368 (1964).

1. THE FEDERAL COURTS MUST RETAIN JURISDICTION UNTIL THEY DETERMINE WHETHER PETITIONER'S CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED.

As its name implies, the writ of habeas corpus is directed to the detention of the physical person of the petitioner. When a state prisoner seeks a writ of habeas corpus in a federal court, the function of the federal court is to determine whether the prisoner's incarceration by the state authorities violates his federal constitutional rights. See 28 USC § 2241(c)(3) (1964). The court's only power is to order the prisoner's release if it finds that he is detained in violation of his constitutional rights. The federal district court must retain the case until it makes that determination—it cannot remand the case to allow the state court to make it, nor can it order the state to revise its judgment, change its procedures, or grant the petitioner a new trial or hearing. See Bailey, *Federal Habeas Corpus—Old Writ, New Role: An Overhaul for State Criminal Justice*, 45 Boston U.L. Rev. 161, 190 (1965). These principles, clear throughout the history of the writ, were recently restated by this Court in *Fay v. Noia*, 372 U.S. 391 (1963), as follows (372 U.S. at 430-431):

“Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power, it cannot revise the state court judgment; it can act only on the body of the petitioner. *Medley, Petitioner*, 134 U.S. 160, 173.”

2. ONCE A CONSTITUTIONAL VIOLATION IS FOUND, HOWEVER, THE STATE MAY BE PERMITTED TO DELAY PETITIONER'S RELEASE BY GRANTING HIM A NEW TRIAL.

A federal court may find a violation of a prisoner's constitutional rights in the denial of due process during his state trial based on one or both of the following:

(1) The court may find that the prisoner has been afforded a constitutionally inadequate procedure for determining an issue, such as the voluntariness of a confession. Such a finding was made in *Jackson v. Denno, supra*. The fault may be in the failure of state law to provide a proper procedure, or in the failure of the trial court to afford the defendant a fair hearing though a proper procedure was available. For shorthand purposes, we refer to this as a finding of a violation of "procedural" due process.

(2) The court may find that the state court determination of a constitutional issue, such as voluntariness of a confession, was erroneous. This may be found on the face of the record, or, more commonly, after a plenary hearing. For shorthand purposes, we refer to this as a violation of "substantive" due process, since it involves the actual decision of a substantive question of historical fact.¹ Was the confession voluntary? Was Robinson insane?

The federal court, after finding that a prisoner is detained in violation of his constitutional rights, may permit the state to retain custody of the prisoner for a reasonable time to hold a new trial or hearing, provided that the constitutional violations which gave rise to the issuance of the writ can be remedied and a sound conviction and incarceration obtained.

Generally speaking, a writ of habeas corpus will be issued conditionally when the federal court has found a violation of "procedural" due process in the conduct of the petitioner's trial or a violation of "substantive" due process on an issue which is of constitutional stature but is less than determinative of the case on its merits, such as where an involuntary confession has been used in obtaining a conviction.

¹ In classical terminology, of course, both these questions would be characterized as involving procedural due process.

3. A PLENARY HEARING IN THE DISTRICT COURT IS REQUIRED WHERE IT CANNOT OTHERWISE BE DETERMINED WHETHER THERE WAS A CONSTITUTIONAL VIOLATION.

Where the federal court on the face of the pleadings or upon examination of the report of proceedings in the state court finds that a violation of the petitioner's rights has infected the state court proceeding, it must issue the writ and order petitioner's release—conditionally or unconditionally as the facts may dictate. On the other hand, the federal court may dismiss or deny the petition without hearing if the prisoner fails to allege a constitutional violation; fails to exhaust state remedies;² or if the record of

² One method in which the federal courts afford the states an opportunity to make their own determination of federal constitutional issues raised by a habeas applicant is to hold that he has failed to exhaust his state court remedies. As this Court held in *Fay v. Noia*, however, this doctrine applies only to remedies which are actually available to the petitioner. In *Brown v. Allen*, 344 U.S. 443 (1953), this Court specifically held that the failure of a state prisoner to exhaust state collateral remedies on an issue he raised at trial and appealed through the highest Court of the state would not constitute a failure to exhaust state court remedies so as to bar federal habeas corpus relief. This decision apparently was based on recognition of the futility of requiring a state prisoner to ask a state trial judge, on collateral attack, to "reverse" his own supreme court on an issue which was raised and rejected at trial and on direct appeal. In Illinois, it is more than just a question of practical futility. Under Illinois law, a defendant is specifically barred from raising any issue in a petition under the Post Conviction Hearing Act, Ill. Rev. Stats. Ch. 38, §§ 122-1 through 122-7 (1965), which was raised and determined at trial or on direct appeal. *People v. Dolgin*, 6 Ill. 2d 109, 111 (1955); *Ciucci v. People*, 21 Ill. 2d 81, 85 (1960). Thus, in the case at bar, there has never been any question but that Robinson has exhausted his state court remedies with respect to the issues here raised. The District Court and the Court of Appeals have so held, and the petitioner has never contended otherwise. Robinson's sole remaining remedy is in federal habeas corpus.

the state court proceedings shows that the prisoner received a full and fair hearing on the constitutional issue in the state court, that the state court applied proper constitutional standards and that its findings are reasonably supported by the record.

But if the petition states facts which, if true, would entitle the prisoner to relief, and if the record does not preclude the possibility of a constitutional violation, then the Federal courts have the *power* to hold an evidentiary hearing on the facts relating to alleged constitutional violations, and if one of the conditions enumerated in *Townsend* exists, the exercise of the hearing power is *mandatory*. The purpose of such a hearing is to determine whether a constitutional violation in fact exists where the record is not determinative of that question. Until that question is answered, for or against a prisoner, a federal court has no power to enter any orders in the proceeding except those necessary in aid of its jurisdiction. It may not issue the writ until it has found a constitutional violation, nor may it require the state court to conduct any further proceedings, including any proceedings aimed at determining the constitutional issue.

Where the petition for writ of habeas corpus raises issues of both "substantive" and "procedural" due process, however, and where the federal court finds, on the face of the record, that procedural errors were committed in the state court which were so grave as to themselves constitute a violation of "procedural" due process, then the court may issue the writ without itself determining the "substantive" issue, on the theory that if the state elects to exercise its opportunity to retry the petitioner under full procedural protections, the need for the federal court to determine the substantive issue may not re-occur.

This is precisely what happened in *Rogers v. Richmond*, 365 U.S. 534 (1961) and *Jackson v. Denno*, 378 U.S. 368 (1964), cited by petitioner (Pet. Br. pp. 28-30). The significant differences in the relief afforded the petitioners in those two cases will be discussed below. Suffice it to say, at this point, that in both cases this Court *found* a violation of "procedural" due process and *issued* the writ of habeas corpus. It did not, as petitioner would suggest, "remand" the case to the state court so that the state court could determine whether a violation of due process had occurred. Such a holding would be impermissible.

B. The Judgment Of The Court Below Should Be Modified To Provide For Issuance Of The Writ of Habeas Corpus.

With respect to each of the constitutional issues discussed in the earlier sections of this brief, we believe that the record on its face shows violations of Robinson's federal constitutional rights. These arguments have been presented and will not be repeated here. To summarize, the record shows that:

- 1) Robinson was denied due process by the failure of the trial court to convene a jury and conduct a hearing to determine his sanity at the time of trial. Because of the substantial evidence that Robinson was insane at the time of trial, due process required that the court invoke the established Illinois procedure for canvassing this issue.
- 2) Robinson was denied due process of law because the trial court failed to afford him a full and fair hearing on the issue of his competence to stand trial, without regard to the procedures required by state law. The conduct of his trial as a race against time deprived him of important witnesses on the issue of competency.

3) Robinson was denied due process of law by the failure of the trial court to afford him a full and fair hearing on the issue of his sanity at the time of the crime. Conducting his trial in an atmosphere of haste deprived him of essential witnesses on this issue.

4) Robinson was in fact insane at the time of the crime, or in any event the state failed to adduce any evidence to prove an essential element of its case; that Robinson was sane at the time of the crime. Thus his detention is unconstitutional.

5) Robinson was deprived of his sixth amendment right to compulsory process by the trial court's refusal to issue a subpoena for the Moores after Robinson's request that they be subpoenaed.

For each of the reasons set forth above, the writ of habeas corpus should issue.

With respect to each of these issues except those mentioned in subparagraph 4, however, this Court could condition the granting of the writ on the failure of the state to retry Robinson within a reasonable time.

If the writ issues, the only remaining question is whether Illinois should be permitted to afford Robinson anything less than a full new trial if it wishes to delay his release.

C. If A Conditional Writ Is Granted, The State Cannot Grant Robinson Anything Less Than A New Trial.

The State argues, on the basis of the decision of this Court in *Jackson v. Denno*, 378 U.S. 368 (1964), that this cause should be "remanded" to the state court for evidentiary hearings on the limited issues of whether Robin-

son was in fact competent to stand trial when he was tried in 1959, and whether he was insane at the time of the alleged crime. We have discussed the erroneous assumption that a federal court in habeas corpus has jurisdiction to "remand" a case to the state court. Nevertheless, if this Court decides that a conditional writ of habeas corpus should issue, it must also determine whether the state may grant Robinson anything less than a new trial on all of the issues. The procedural issues raised by *Jackson v. Denno* would thus be squarely presented.

1. THIS COURT HAS ALWAYS SOUGHT TO RECOGNIZE THE "EXIGENCIES OF FEDERALISM" SO LONG AS ITS HIGHER DUTY TO ENFORCE THE FEDERAL CONSTITUTION IS NOT IMPAIRED.

The federal courts have always been sensitive to the delicate relationship between state and federal courts and the "exigencies of federalism" as affected by habeas corpus proceedings involving state prisoners. At the same time these considerations have not deterred the federal courts from affording the writ its full use in guaranteeing all citizens the protection of the federal constitution. As this Court stated in *Fay v. Noia*:

"There is no higher duty than to maintain it [the writ of habeas corpus] unimpaired . . ." (372 U.S. at 400.)

These dual considerations were of utmost importance to the result reached by this Court in *Rogers v. Richmond*, 365 U.S. 534 (1961), which involved a claim that a coerced confession had been used in obtaining the petitioner's state conviction. This Court granted certiorari to determine whether a plenary hearing in the District Court was necessary on the "substantive" issue of whether the confession was in fact coerced. (365 U.S. at 540.) Upon examination of the record, however, this Court found that the state

court had used an improper standard for determining whether the confession was voluntary and admissible. The use of the improper standard itself deprived the prisoner of "procedural" due process of law. Thus, without determining whether the confession was in fact involuntary and whether its admission into evidence violated petitioner's "substantive" constitutional rights, this Court ordered the writ issued, subject to the right of the state to retry petitioner. This Court felt that the federal courts should not withhold the writ and retain jurisdiction to determine the "substantive" issue of whether the confession was, in fact, involuntary. And that holding was based as much upon considerations of federalism as upon concern for the rights of the petitioner. This Court reasoned that the state court, wherever possible, should have the *opportunity* to decide the "substantive" issue, applying proper standards and procedures, before the federal courts took jurisdiction. This opportunity was afforded the state by issuance of the conditional writ. Of course, this Court would have ordered the District Court to hold a plenary hearing and decide the "substantive" issue if the record had not, on its face, revealed the violation of "procedural" due process. This was subsequently made clear by this Court in *Townsend*.

The considerations of federalism expressed in *Rogers* were carried one step further in *Jackson v. Denno*, 378 U.S. 368 (1964). In that case, this Court invalidated the New York procedure which allowed the trial judge to submit the question of the voluntariness of a confession to the jury along with the question of guilt or innocence, rather than making a full, independent determination of voluntariness before trial. This Court found that this *procedure* itself failed to meet applicable standards of due process.

This Court therefore held that the writ should issue. Rather than condition the petitioner's release on the state's failure to afford him a new trial, however, this Court allowed the state to grant the petitioner a *limited, separate hearing on the voluntariness of his confession*. If the confession were found to be voluntary on that hearing, no new trial would be necessary. (Of course, petitioner would be free thereafter to seek a plenary hearing on the issue in the District Court in a new petition for writ of habeas corpus).

The question, then, is whether the *Jackson*³ procedure is applicable to the case at bar, so that if the writ issues, the state could be permitted to grant Robinson a separate limited hearing either on the issue of his sanity at the time of the alleged crime, or his competency to stand trial in 1959, or both. The answer is clearly "No".

2. THE UNIQUE CONSIDERATIONS OF "FEDERALISM" WHICH INFLUENCED THIS COURT IN *JACKSON* v. DENNO ARE NOT PRESENT HERE.

The rationale of *Jackson* is inapplicable to the case at bar for two reasons.

First, in *Jackson* the petitioner had apparently received a full and fair hearing with respect to his confession in accordance with long standing state procedures. Indeed, as this Court emphasized, New York could not have anticipated that its long accepted procedure would be found inadequate. Under these circumstances, in what might be termed a "twinge of conscience", this Court found it appropriate to take special pains to avoid imposing on

³ Although the state has only cited *Jackson*, we point out that this Court has, since *Jackson*, entered a similar order under similar factual conditions in *Boles v. Stevenson*, 379 U.S. 43 (1964). In *Henry v. Mississippi*, 379 U.S. 443 (1965) this Court remanded a case to the state court for a limited hearing. However, that case was on direct review, so that a remand order was possible.

the "delicate relationship between state and federal courts." Because New York never had an opportunity to apply proper procedures to Jackson's case, this court devised the technique of permitting the state to hold a limited hearing as a means of avoiding execution on the writ. That this was the motivating factor in the Court's holding is apparent from its opinion (378 U.S. at 395):

"Obviously, the State is free to give Jackson a new trial if it so chooses, but for us to impose this requirement before the outcome of the new hearing on voluntariness is known would not comport with the interests of sound judicial administration and the proper relationship between federal and state courts. We cannot assume that New York will not now afford Jackson a hearing that is consistent with the requirements of due process. *Indeed, New York thought it was affording Jackson such a hearing, and not without support in the decisions of this Court*, when it submitted the issue of voluntariness to the same jury that adjudicated guilt." (Emphasis added.)

The considerations which led this Court to devise the unique form of writ in *Jackson* are not present in the case at bar. Robinson is not suggesting that the established Illinois procedure for determining sanity at the time of the crime or at the time of trial must be changed. This is a case where the record shows that the state failed to afford Robinson the protection of its own standards for considering basic constitutional issues and failed to afford Robinson fundamental due process with respect to issues which it recognized were of constitutional significance. The state had an adequate opportunity to give Robinson a full and fair trial in accordance with proper standards and procedures, but failed to do so.

To extend the *Jackson* procedure to cases of this nature would allow a state to continually deny a prisoner its recognized procedures. If every time a state refused to afford a prisoner a fair hearing on constitutional issues the district court on habeas corpus would simply return the case to the state courts for limited hearing, the prisoner might indefinitely be denied his substantial procedural rights. See *Robbins v. Green*, 218 F.2d 192, 195 (1st Cir. 1954). Furthermore, as a practical matter, the state trial judge, conducting a limited hearing, cannot help but be influenced by the earlier finding against the defendant, both on the limited issue and generally. This is especially true when the conviction was reviewed and affirmed by his state supreme Court. We do not necessarily suggest that the Illinois courts would again deny Robinson a fair hearing if a limited hearing were allowed, or even that the state court judge, on limited hearing, would be influenced in his findings by what occurred before. But these are possibilities, however remote, which this Court need not suffer where, as here, Illinois had an opportunity to apply adequate procedures, but failed to do so. The peculiar circumstances which motivated this Court in *Jackson*, in accordance with the exigencies of federalism, are absent here.

3. ROBINSON'S RIGHTS WOULD NOT BE FULLY PROTECTED IF THE "JACKSON" PROCEDURE WERE APPLIED HERE.

A second factor which permitted this Court to order a limited hearing in *Jackson* clearly precludes such a hearing here.

The denial of "procedural" due process which this Court found in *Jackson* was the failure of the *trial judge* to hold a *separate hearing* and make definitive findings on a matter of *historical fact*. The exact procedure which was originally denied to Jackson could now be afforded him

in a limited hearing, under the same conditions as would have applied at Jackson's trial. If the trial judge, after conducting such a hearing in the first instance, had found that the confession was voluntary, Jackson's jury trial on the merits would have been conducted exactly as it was, with the same result. This Court in the *Jackson* opinion clearly emphasized that the limited hearing technique on the peculiar facts of that case would give Jackson every right and advantage that he would have had if his original trial had been conducted in accordance with procedural due process. Such a finding is the *sine qua non* for approval of the "limited hearing" technique adopted by the majority in *Jackson*.

In this case, however, it is clear that Robinson could *not* be afforded his full rights by a limited hearing in the state court, either on the issue of sanity at the time of the crime or sanity at the time of trial. A separate judicially conducted hearing limited to the issue of Robinson's sanity at the time of the crime would be an entirely unique proceeding, much different from that to which Robinson was originally entitled. The issue of sanity at the time of the crime is not a collateral issue like the voluntariness of a confession. It is an issue to be tried together with, and as a part of, the defendant's trial on the merits. It is an issue on which the right to cross examine the state's occurrence witnesses is often important, as demonstrated by this case. In a limited hearing, the state would not be required to produce these witnesses and the defendant might be unable to do so. It is an issue on which the defendant has a right to a jury trial under both the state and federal constitutions. Robinson waived that right when the issue was first heard, but if he was denied a fair trial by the court in the first instance, he should and would have an opportunity to assert that right upon a new

trial. A limited hearing would deprive him of his right to a jury trial. Finally, it is an issue which, when tried with the case on the merits, may affect the verdict even in the absence of a finding of insanity, as by leading the judge or jury to a finding of guilty of a lesser included offense, such as voluntary manslaughter. This result would not be possible with a limited hearing in the state court on the issue of sanity at the time of the crime, whereby the murder verdict would be permitted to stand if Robinson is found to have been sane.

Clearly, if due process was denied Robinson by the state court's handling of the issue of his sanity at the time of the crime, it cannot be satisfied by now permitting the state to keep him in custody upon granting him a separate judicial hearing in which the issues are limited to sanity at the time of the crime. He must have a new trial.

The same is true, although for somewhat different reasons, with respect to the issue of sanity at the time of trial. On its face, this issue is more nearly analogous to the confession situation in *Jackson*, since the issue of competency to stand trial is a "collateral" issue which, under proper Illinois procedure, is determined by a jury in a proceeding separate from the trial on the merits. Nevertheless, a crucial distinction makes it impossible to afford Robinson the right he was denied in 1959 by now holding a hearing limited to the issue of his competency to stand trial in 1959.

The determination of competency to stand trial is a unique proceeding in criminal jurisprudence. While the pretrial hearing on the voluntariness of a confession or the admissibility of evidence is intended to determine his-

torical facts, the jury hearing on competency to stand trial is very different. That procedure is intended to determine a presently existing state of being of the defendant. The question to be decided is whether at the moment of decision, the defendant is competent. The jury has an opportunity to observe the defendant during the proceeding. Expert psychiatric witnesses who have observed him immediately prior to the hearing will testify. It is, in short, a proceeding designed to determine as accurately as possible, a present, existing fact of critical importance.

Such a determination simply cannot be made six years after the fact. To have a jury determine now whether Robinson was competent to stand trial in 1959 is to change the very nature of the right which was denied him in 1959. The jury would be unable to observe the subject of their inquiry. Expert witnesses would have to testify solely on the basis of their reading of the cold record of the prior trial. The unique value of a concurrent rather than historical determination is wholly lost. Robinson had a right to a full and adequate determination of his competency to stand trial at the time he was tried. Having been denied that right, it is obvious that his constitutional rights cannot be protected by attempting to make that determination six years after the fact. He is entitled to a new trial, prior to which the question of his *present* competency may be canvassed. The *Jackson* "limited hearing" technique simply cannot be applied.

4. THE "JACKSON" PROCEDURE SHOULD BE RE-EXAMINED, OR STRICTLY LIMITED.

The *Jackson* approach is inapplicable to the case at bar, both because the uniquely strong considerations of "federalism" which existed in *Jackson* are absent here, and because the rights of Robinson cannot be adequately protected by limited hearings on the issues of sanity at the

time of the crime or at the time of trial. Moreover, we share the concern expressed in the dissenting opinions of Justices Black and Clark in *Jackson*, and Justice Black in *Henry v. Mississippi*, 379 U.S. 443, 453 (1965) and *United States v. Shotwell Mfg. Co.*, 355 U.S. 233, 246 (1957) over such a "piecemeal procedure". Even in a case such as *Jackson* it is difficult to say that the defendant is being afforded his full rights by a limited hearing. The basic concept of habeas corpus requires that a prisoner detained in violation of his constitutional rights be afforded a full retrial. The right of the citizen to due process is too basic to our civilization to be diluted by attempts at piecemeal corrections. To permit such a procedure is to encourage less than devoted attention to fundamental rights by the state courts. And however difficult it may be to see how the defendant's rights can be prejudiced by the procedure in a case like *Jackson*, the risk should not be taken.

Moreover, the court cannot ignore the subtle influences which are brought to bear on a state trial judge, however conscientious and devoted, when faced with the task of retrying a limited issue which has already been decided against the defendant both by a fellow trial judge and the supreme court of his state, particularly where a decision on the defendant's behalf will cause the state to release him or grant him a full new trial. That Illinois, under its Post Conviction Hearing Act, refuses to permit its trial court even to consider issues previously raised at trial or rejected on appeal provides a further indication of the reception Robinson would receive if a limited hearing were ordered. As indicated above (footnote 2, p. 66), the futility of requesting a state trial court to re-examine a contention previously re-

jected by the state supreme court led this Court to hold, in *Brown v. Allen*, 344 U.S. 443 (1953), that state remedies were adequately exhausted for habeas corpus purposes without resort to collateral attacks on previously determined issues.

The recent decision of the Supreme Court of Washington in *White v. Rhay*, 399 P. 2d 522 (1965), is also instructive, both in revealing the attitude of some state courts toward habeas corpus applicants, and in its rejection of federal court efforts to afford the state an opportunity to re-examine federal constitutional issues. (399 P. 2d at 528-30)

The case at bar is clearly distinguishable from *Jackson*. Nevertheless, we respectfully suggest that this court re-examine the procedure adopted in that case.

5. THE NUMBER OF FEDERAL HABEAS CORPUS PETITIONS CAN BE REDUCED ONLY BY PERSUADING THE STATES TO GIVE SCRUPULOUS ATTENTION TO CONSTITUTIONAL CLAIMS IN THE FIRST INSTANCE.

We are aware of this Court's concern over the increasing number of habeas corpus petitions filed in the district courts, coupled with the dissatisfaction voiced in some quarters over the federal courts' "pre-emption" of the states' administration of their criminal laws. Nevertheless, this Court's first concern must be to afford the full protections of the Constitution to all citizens, and to "maintain [the writ of habeas corpus] unimpaired." The increase in the number of habeas corpus *petitions* is caused, not so much by procedural decisions such as *Townsend* and *Fay* as by those decisions recognizing the expanding concept of due process in our society, such as *Mapp v. Ohio*, 376 U.S. 693 (1961), *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Griffin v. Illinois*, 351 U.S. 12 (1956), *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Jackson* itself. Much of the present habeas corpus litigation originates with prisoners

who have been in state custody for many years, but whose claims have only recently been held to raise legitimate questions of due process. The number of petitions will inevitably diminish as the backlog is eliminated. It is true that the *Toussend* decision caused an increase in the number of plenary hearings in the district courts, but even so, in the year ended June 30, 1965 only about eleven percent of the habeas petitions disposed of by the district courts reached the hearing stage. [1965 Annual Report of the Administrative Director of U. S. Courts, Table C4 (tentative draft).] - With 468 such hearings split among 289 District Court judgeships over a period of a year, it can hardly be said the burden is so intolerable as to justify any drastic narrowing of the protections now afforded.

Moreover, the *Jackson* procedure will not lessen the work load presently placed on the federal courts—they must still determine whether a constitutional violation has occurred. Having accomplished that task, it will not affect the federal judges' workload whether the state is required to hold a full trial or a limited hearing. On the other hand, permitting the states to attempt to correct due process violations on a piecemeal basis may lessen the motivation of the states to be diligent in protecting the defendant's rights in the first instance—and experience shows that it is stimulation of this motivation, rather than an undue, and often unappreciated concern for "federalism" and "comity", which in the long run will reduce the number of habeas corpus hearings in the federal courts.

Until the state courts themselves can be persuaded to exercise scrupulous care in considering the federal constitutional claims of their criminal defendants, it will continue to be necessary to hold plenary hearings in the district courts in a certain number of cases. We do not

suggest that this Court should ignore the "delicate balance between the state and federal courts." In the unusual situation where a previously unquestioned state procedure of long usage is struck down, as in *Jackson*, there may be just cause for exercising particular discretion. But in any other situation, both the full protection of the constitutional rights of the defendant and the desire to reduce the number of plenary hearings in the district courts will best be served by compelling the states to afford a full and fair trial to defendants who were denied a fair trial in the first instance. As this goal is achieved, and the occasions for federal court examinations of state fact findings diminish, so, necessarily, will the concern over "pre-emption" diminish.

CONCLUSION.

The opinion of the Court of Appeals for the Seventh Circuit should be affirmed, but modified to provide that the writ of habeas corpus issue unconditionally. Alternatively, a conditional writ should issue, affording the state courts a reasonable time to grant Robinson a new trial. At the very least, the opinion of the Court below, ordering plenary hearings in the District Court, should be affirmed.

Respectfully submitted,

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APPENDIX A

RECOGNIZED DEFINITIONS OF APPLICABLE FORMS OF INSANITY

A. *Schizophrenia—paranoid type.*¹

"The features which tend to be most evident in this type or phase are delusions which are often numerous, illogical and disregarding of reality, hallucinations and the usual schizophrenic disturbance of associations and of affect together with negativism.

"Frequently the prepsychotic personality of the paranoid schizophrenic has been characterized by poor interpersonal rapport. Often he has been cold, withdrawn, distrustful, and resentful of other persons. Many have been truculent, had a chip-on-the-shoulder attitude, have been argumentative, scornful, sarcastic, defiant, resentful of suggestions or of authority and given to caustic remarks. Sometimes flippant, facetious responses may have covered an underlying hostility.

"... Delusions of persecution are the most prominent in paranoid schizophrenia, but expansive and obviously wish-fulfilling ideas and hypochondriacal and depressive delusions are not uncommon. . . . Repressed aggressive tendencies may be released in a major outburst; some inarticulate paranoids may manifest an unpredictable assaultiveness."

B. *Manic-Depression.*²

"*General symptoms.* The clinical picture in manic-depressive reactions is colored by the predominant emotional

¹ Noyes and Kolb, *Modern Clinical Psychiatry* (5th ed. 1958) pp. 409-10.

² Coleman, *Abnormal Psychology and Modern Life* (2d ed. 1956) pp. 299-300, 307-08.

App. 2

mood of the patient, which may be one of elation or depression. Against this affective background, there may be a variety of psychological and behaviorial symptoms which are roughly appropriate to the prevailing mood. Delusions and hallucinations are common in both manic and depressive reactions. In manic reactions, these commonly include delusions of grandeur. In depressive reactions, delusions center around self-blame and self-depreciation.

• • •

"In mixed reactions there may be various combinations of manic and depressive symptoms at the same time. For example, there may be a 'manic stupor', in which the patient experiences marked feelings of elation, accompanied by a dearth of ideas and generally decreased psychomotor activity. There are also patients who manifest a severely depressed mood, with self-accusatory and other morbid ideas, accompanied by marked mental and motor excitement in which the patient may restlessly pace the floor, wring his hands, and bewail his fate."

C. *Schizophrenic reaction, schizo-affective type.*²

"This category is used for cases shading over into effective [*e.g.*, manic-depressive] reactions. The mental content may be predominantly schizophrenic but accompanied by pronounced elation or depression. Or the affective coloring may predominate, accompanied by schizophrenic-like thinking or bizarre behavior."

² Coleman, *Abnormal Psychology and Modern Life* (2d ed. 1956) p. 273.

SUPREME COURT OF THE UNITED STATES

No. 382.—OCTOBER TERM, 1965.

Frank J. Pate, Warden, Petitioner, v. Theodore Robinson.	}	On Writ of Certiorari to the United States Court of Ap- peals for the Seventh Circuit.
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[March 7, 1966.]

MR. JUSTICE CLARK delivered the opinion of the Court.

In 1959 respondent Robinson was convicted of the murder of his common-law wife, Flossie May Ward, and was sentenced to imprisonment for life. Being an indigent he was defended by court-appointed counsel. It was conceded at trial that Robinson shot and killed Flossie May, but his counsel claimed that he was insane at the time of the shooting and raised the issue of his incompetence to stand trial. On writ of error to the Supreme Court of Illinois it was asserted that the trial court's rejection of these contentions deprived Robinson of due process of law under the Fourteenth Amendment. His conviction was affirmed, the court finding that no hearing on mental capacity to stand trial had been requested, that the evidence failed to raise sufficient doubt as to his competence to require the trial court to conduct a hearing on its own motion, and further that the evidence did not raise a "reasonable doubt" as to his sanity at the time of the offense. 22 Ill. 2d 162, 174 N. E. 2d 820 (1961). We denied certiorari. 368 U. S. 995 (1962). Thereupon, Robinson filed this petition for habeas corpus, which was denied without a hearing by the United States District Court for the Northern District of Illinois. The Court of Appeals reversed, 345 F. 2d 691 (1965), on the ground that Robinson was convicted in an unduly hurried trial without a fair oppor-

tunity to obtain expert psychiatric testimony, and without sufficient development of the facts on the issues of Robinson's insanity when he committed the homicide and his present incompetence. It remanded the case to the District Court with directions to appoint counsel for Robinson; to hold a hearing as to his sanity when he committed the offense; and, if it found him to have been insane at that time, to order his release, subject to an examination into his present mental condition. The Court of Appeals directed that the District Court should also determine upon the hearing whether Robinson was denied due process by the state court's failure to conduct a hearing upon his competence to stand trial; and, if it were found his rights had been violated in this respect, that Robinson "should be ordered released, but such release may be delayed for a reasonable time . . . to permit the State of Illinois to grant Robinson a new trial." We granted certiorari to resolve the difficult questions of state-federal relations posed by these rulings. 382 U. S. 890 (1965). We have concluded that Robinson was constitutionally entitled to a hearing on the issue of his competence to stand trial. Since we do not think there could be a meaningful hearing on that issue at this late date, we direct that the District Court, after affording the State another opportunity to put Robinson to trial on its charges within a reasonable time, order him discharged. Accordingly, we affirm the decision of the Court of Appeals in this respect, except insofar as it contemplated a hearing in the District Court on Robinson's competence. Our disposition makes it unnecessary to reach the other reasons given by the Court of Appeals for reversal.¹

¹ Nor do we pass on the contention that Robinson was denied his Sixth Amendment rights by the trial judge's refusal to issue summons for material witnesses.

I.

The State concedes that the conviction of an accused person while he is legally incompetent violates due process, *Bishop v. United States*, 350 U. S. 961 (1956), and that state procedures must be adequate to protect this right. It insists, however, that Robinson intelligently waived this issue by his failure to request a hearing on his competence at the trial; and, further, that on the basis of the evidence before the trial judge no duty rested upon him to order a hearing *sua sponte*. A determination of these claims necessitates a detailed discussion of the conduct of the trial and the evidence touching upon the question of Robinson's competence at that time.

The uncontradicted testimony of four witnesses² called by the defense revealed that Robinson had a long history of disturbed behavior. His mother testified that when he was between seven and eight years of age a brick dropped from a third floor hit Robinson on the head. "He blacked out and the blood run from his head like a faucet." Thereafter "he acted a little peculiar." The blow knocked him "cockeyed" and his mother took him to a specialist "to correct the crossness of his eyes." He also suffered headaches during his childhood, apparently stemming from the same event. His conduct became noticeably erratic about 1946 or 1947 when he was visiting his mother on a furlough from the Army. While Robinson was sitting and talking with a guest, "he jumped up and run to a bar and kicked a hole in the bar and he run up in the front." His mother asked "what on earth was wrong with him and he just stared at [her], and paced the floor with both hands in his pockets." On other occasions he appeared in a daze with a "glare in

² These witnesses were Miss Willie Ceola Peterson, Robinson's mother; Mr. William H. Langham, his grandfather; Mrs. Helen Calhoun, his aunt, and Mrs. Alice Moore, a family friend.

his eyes," and would not speak or respond to questions. In 1951, a few years after his discharge from the service, he "lost his mind and was pacing the floor saying something was after him." This incident occurred at the home of his aunt, Helen Calhoun. Disturbed by Robinson's conduct, Mrs. Calhoun called his mother about six o'clock in the morning, and she "went to see about him." Robinson tried to prevent Mrs. Calhoun from opening the door, saying "that someone was going to shoot him or someone was going to come in after him." His mother testified that, after gaining admittance, "I went to him and hugged him to ask him what was wrong and he went to pushing me back, telling me to get back, somebody was going to shoot him, somebody was going to shoot him." Upon being questioned as to Robinson's facial expression at the time, the mother stated that he "had that starey look and seemed to be just a little foamy at the mouth." A policeman was finally called. He put Robinson, his mother and aunt in a cab which drove them to Hines Hospital. On the way Robinson tried to jump from the cab, and upon arrival at the hospital he was so violent that he had to be strapped in a wheel chair. He then was taken in an ambulance to the County Psychopathic Hospital, from which he was transferred to the Kankakee State Hospital. The medical records there recited:

"The reason for admission: The patient was admitted to this hospital on the 5th day of June, 1952, from the Hines Hospital. Patient began presenting symptoms of mental illness about a year ago at which time he came to his mother's house. He requested money and when it was refused, he suddenly kicked a hole in her bar.

"Was drinking and went to the Psychopathic Hospital. He imagined he heard voices, voices of men

and women and he also saw things. He saw a little bit of everything. He saw animals, snakes and elephants and this lasted for about two days. He went to Hines. They sent him to the Psychopathic Hospital. The voices threatened him. He imagined someone was outside with a pistol aimed at him. He was very, very scared and he tried to call the police and his aunt then called the police. He thought he was going to be harmed. And he says this all seems very foolish to him now. Patient is friendly and tries to cooperate.

“He went through an acute toxic episode from which he has some insight. He had been drinking heavily. I am wondering possibly he isn't schizophrenic. I think he has recovered from this condition. I have seen the wife and she is in a pathetic state. I have no objection to giving him a try.”

After his release from the state hospital Robinson's irrational episodes became more serious. His grandfather testified that while Robinson was working with him as a painter's assistant, “all at once, he would come down [from the ladder] and walk on out and never say where he is going and whatnot and he would be out two or three hours, and at times he would be in a daze and when he comes out, he comes back just as fresh. He just says he didn't do anything. I noticed that he wasn't at all himself.” The grandfather also related that one night when Robinson was staying at his house Robinson and his wife had a “ruckus,” which caused his wife to flee to the grandfather's bedroom. Robinson first tried to kick down the door. He then grabbed all of his wife's clothes from their room and threw them out in the yard, intending to set them on fire. Robinson got so unruly that the grandfather called the police to lock him up.

In 1953 Robinson, then separated from his wife, brought their 18-month-old son to Mrs. Calhoun's home and asked permission to stay there for a couple of days. She observed that he was highly nervous, prancing about and staring wildly. While she was at work the next day Robinson shot and killed his son and attempted suicide by shooting himself in the head. It appeared that after Robinson shot his son, he went to a nearby park and tried to take his life again by jumping into a lagoon. By his mother's description, he "was wandering around" the park, and walked up to a policeman and "asked him for a cigarette." It was stipulated that he went to the South Park Station on March 10, 1953, and said that he wanted to confess to a crime. When he removed his hat the police saw that he had shot himself in the head. They took him to the hospital for treatment of his wound.

Robinson served almost four years in prison for killing his son, being released in September 1956. A few months thereafter he began to live with Flossie May Ward at her home. In the summer of 1957 or 1958 Robinson "jumped on" his mother's brother-in-law and "beat him up terrible." She went to the police station and swore out a warrant for his arrest. She described his abnormalities and told the officers that Robinson "seemed to have a disturbed mind." She asked the police "to pick him up so I can have him put away." Later she went back to see why they had not taken him into custody because of "the way he was fighting around in the streets, people were beating him up." She made another complaint a month or so before Robinson killed Flossie May Ward. However, no warrant was ever served on him.

The killing occurred about 10:30 p. m. at a small barbecue house where Flossie May Ward worked. At that time there were 10 customers in the restaurant, six of them sitting at the counter. It appears from the

record that Robinson entered the restaurant with a gun in his hand. As he approached the counter, Flossie May said, "Don't start nothing tonight." After staring at her for about a minute, he walked to the rear of the room and, with the use of his hand, leaped over the counter. He then rushed back toward the front of the restaurant, past two other employees working behind the counter, and fired once or twice at Flossie May. She jumped over the counter and ran out the front door with Robinson in pursuit. She was found dead on the sidewalk.³ Robinson never spoke a word during the three to four minute episode.

Subsequently Robinson went to the apartment of a friend, Mr. Moore, who summoned the police. When three officers, two in uniform, arrived, Robinson was standing in the hall approximately half way between the elevator and the apartment. Unaware of his identity, the officers walked past him and went to the door of the apartment. Mrs. Moore answered the door and told them that Robinson had left a short time earlier. As the officers turned around they saw Robinson still standing where they had first observed him. Robinson made no attempt to avoid being arrested. When asked his address he gave several evasive answers. He also denied knowing anything about the killing.⁴

³ The Reverend Elmer Clemons was also shot and killed in the fracas. The indictment covering that offense was dismissed at the close of the trial in question.

⁴ According to the testimony of an arresting officer the following exchange took place:

"I asked him what his name was and he said, 'My name is Ted.' I said, 'What is your real name?' And he said, 'Theodore Robinson.' Then I asked him—I told him he was under arrest and he said, 'For what?' I said, 'Well, you are supposed to be wanted for killing two people on the south side.' I asked him did he know anything about

Four defense witnesses expressed the opinion that Robinson was insane.⁵ In rebuttal the State introduced only a stipulation that Dr. William H. Haines, Director of the Behavior Clinic of the Criminal Court of Cook County would, if present, testify that in his opinion Robinson "knew the nature of the charges against him and was able to cooperate with counsel" when he examined him two or three months before trial. However, since, the stipulation did not include a finding of sanity the prosecutor advised the court that "we should have Dr. Haines' testimony as to his opinion whether this man is sane or insane. It is possible that the man might be insane and know the nature of the charge or be able to cooperate with his counsel. I think it should be in evidence, your Honor, that Dr. Haines' opinion is that this defendant was sane when he was examined." However, the court told the prosecutor, "You have enough in the record now. I don't think you need Dr. Haines."

it. He said, 'No, I don't know what you are talking about.' So then I asked him where he lived and he said, 'I don't live no place.'

"I said, 'What do you mean you don't live no place?' He said, 'That's what I said.'

"So then pretty soon asked him again and he said, 'Sometimes I stay with my mother.' And I said, 'Where does she live?' He said, 'Some address on East 44th Street.'

"So then we took him on to the 27th District and while we were making the arrest slip, asked him again his address and he said he lived at 7320 South Parkway. That's about all he said. He didn't know anything about any killing or anything."

⁵ His mother stated: "I think he is insane." Mrs. Calhoun testified as follows:

"Q. Do you have an opinion as to whether or not presently he is sane or insane?

"A. He is sick. He is insane.

"Q. First of all, do you have an opinion?

"A. Yes.

Q. What is your opinion as to his present sanity?

"A. He is mentally sick."

In his summation defense counsel emphasized "our defense is clear It is as to the sanity of the defendant at the time of the crime and also as to the present time." The court, after closing argument by the defense, found Robinson guilty and sentenced him to prison for his natural life.

II.

The State insists that Robinson deliberately waived the defense of his competence to stand trial by failing to demand a sanity hearing as provided by Illinois law. But it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently "waive" his right to have the court determine his capacity to stand trial. See *Taylor v. United States*, 282 F. 2d 16, 23 (C. A. 8th Cir. 1960). In any event, the record shows that counsel throughout the proceedings insisted that Robinson's present sanity was very much in issue. He made a point to elicit Mrs. Robinson's opinion of Robinson's "present sanity." And in his argument to the judge, he asserted that Robinson "should be found not guilty and presently insane on the basis of the testimony that we have heard." Moreover, the prosecutor himself suggested at trial that "we should have Dr. Haines' testimony as to his opinion whether this man is sane or insane." With this record we cannot say that Robinson waived the defense of incompetence to stand trial.⁶

⁶ Although defense counsel phrased his questions and argument in terms of Robinson's present insanity, we interpret his language as necessarily placing in issue the question of Robinson's mental competence to stand trial. Counsel was simply borrowing the terminology of the relevant Illinois statutes and decisions. The state law in effect at the time of Robinson's trial differentiated between lack of criminal responsibility and competence to stand trial, but used "insanity" to describe both concepts. Ill. Rev. Stat., c. 38, §§ 592, 593 (1963). The judges likewise phrased their decisions only in terms of sanity and insanity. See, e. g., *People v. Baker*, 26 Ill. 2d 484, 187 N. E. 2d 227 (1962). The statutory provisions and

We believe that the evidence introduced on Robinson's behalf entitled him to a hearing on this issue. The court's failure to make such inquiry thus deprived Robinson of his constitutional right to a fair trial.⁷ See *Thomas v. Cunningham*, 313 F. 2d 934 (C. A. 4th Cir. 1963). Illinois jealously guards this right. Where the evidence raises a "bona fide doubt" as to defendant's competence to stand trial, the judge on his own motion must impanel a jury and conduct a sanity hearing pursuant to Ill. Rev. Stat., c. 38, § 104-2 (1963). *People v. Shrake*, 25 Ill. 2d 141, 182 N. E. 2d 754 (1962). The Supreme Court of Illinois held that the evidence here was not sufficient to require a hearing in light of the mental alertness and understanding displayed in Robinson's "colloquies" with the trial judge. 22 Ill. 2d, at 168, 174 N. E. 2d, at 823. But this reasoning offers no justification for ignoring the uncontradicted testimony of Robinson's history of pronounced irrational behavior. While Robinson's demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue. Cf. *Bishop v. United States*, 350 U. S. 961 (1956), reversing, 223 F. 2d 582, 585 (C. A. D. C. Cir. 1955). Likewise, the stipulation of Dr. Haines' testimony was some evi-

terminology in this field have now been clarified by the enactment of an article dealing with the "competency of accused." Ill. Rev. Stat., c. 38, §§ 104-1 to 104-3 (1963), as amended by the Code of Criminal Procedure of 1963. Even if counsel may also have meant to refer to the statutory provisions dealing with commitment for present insanity, Ill. Rev. Stat., c. 38, § 592 (1963), this fact would not affect the determination that counsel's words raised a question as to competence that the trial judge should have considered.

⁷ Moreover, as the Court of Appeals stressed, the trial judge did not give Robinson an opportunity to introduce expert testimony on the question of his sanity. The judge denied counsel's request for a continuance of several hours in order to secure the appearance of a psychiatrist from the Illinois Psychiatric Institute.

dence of Robinson's ability to assist in his defense. But, as the state prosecutor seemingly admitted, on the facts presented to the trial court it could not properly have been deemed dispositive on the issue of Robinson's competence.³

III.

Having determined that Robinson's constitutional rights were abridged by his failure to receive an adequate hearing on his competence to stand trial, we direct that the writ of habeas corpus must issue and Robinson be discharged, unless the State gives him a new trial within a reasonable time. This disposition accords with the procedure adopted in *Rogers v. Richmond*, 365 U. S. 534 (1961). We there determined that since the state court had applied an erroneous standard to judge the admissibility of a confession, the "defendant should have the opportunity to have all issues which may be determinative of his guilt tried by a state judge or a state jury under appropriate state procedures which conform to the requirements of the Fourteenth Amendment." At 547-548. It has been pressed upon us that it would be sufficient for the state court to hold a limited hearing as to Robinson's mental competence at the time he was tried in 1959. If he were found competent, the judgment against him would stand. But we have previously emphasized the difficulty of retrospectively determining an accused's

³ As defense counsel insisted in his closing argument:

"In this case, which is a very serious case, the defendant has been able to cooperate with counsel with some reservations. . . . However, I do not feel that this present . . . lucidity bears on the issue of his sanity at the time of the crime and his sanity at the present time. I think the words sanity and insanity, the words are legal terms. I think that presently Mr. Theodore Robinson is in a lucid interval. I believe that from the witness stand you have heard testimony to indicate and prove that Mr. Theodore Robinson is presently insane. . . ."

competence to stand trial. *Dusky v. United States*, 362 U. S. 402 (1960). The jury would not be able to observe the subject of their inquiry, and expert witnesses would have to testify solely from information contained in the printed record. That Robinson's hearing would be held six years after the fact aggravates these difficulties. This need for concurrent determination distinguishes the present case from *Jackson v. Denno*, 378 U. S. 368 (1964), where we held that on remand the State could discharge its constitutional obligation by giving the accused a separate hearing on the voluntariness of his confession.

If the State elects to retry Robinson, it will of course be open to him to raise the question of his competence to stand trial at that time and to request a special hearing thereon. In the event a sufficient doubt exists as to his present competence such a hearing must be held. If found competent to stand trial, Robinson would have the usual defenses available to an accused.

The case is remanded to the District Court for action consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 382.—OCTOBER TERM, 1965.

Frank J. Pate, Warden, Petitioner, v. Theodore Robinson.	} On Writ of Certiorari to the United States Court of Ap- peals for the Seventh Circuit.
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[March 7, 1966.]

MR. JUSTICE HARLAN, whom MR. JUSTICE BLACK joins, dissenting.

The facts now canvassed by this Court to support its constitutional holding were fully sifted by the Illinois Supreme Court. I cannot agree that the state court's unanimous appraisal was erroneous and still less that it was error of constitutional proportions.

The Court appears to hold that a defendant's present incompetence may become sufficiently manifest during a trial that it denies him due process for the trial court to fail to conduct a hearing on that question on its own initiative. I do not dissent from this very general proposition, and I agree also that such an error is not "waived" by failure to raise it and that it may entitle the defendant to a new trial without further proof. Waiver is not an apposite concept where we premise a defendant so deranged that he cannot oversee his lawyers. Since our further premise is that the trial judge should and could have avoided the error, a new trial seems not too drastic an exaction in view of the proof problems arising after a significant lapse of time.¹ However, I do not believe the facts known to the trial judge in this case suggested

¹ The constitutional violation alleged is the failure to make an inquiry. In the more usual case, the simple claim that a defendant was convicted while incompetent during the trial, there is of course no proof of a constitutional violation until that incompetence is established in appropriate proceedings.

Robinson's incompetence at time of trial with anything like the force necessary to make out a violation of due process in the failure to pursue the question.

Before turning to the facts, it is pertinent to consider the quality of the incompetence they are supposed to indicate. In federal courts—and I assume no more is asked of state courts—the test of incompetence that warrants postponing the trial is reasonably well settled. In language this Court adopted on the one occasion it faced the issue, “the ‘test must be whether . . . [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.’” *Dusky v. United States*, 362 U. S. 402. In short, emphasis is on capacity to consult with counsel and to comprehend the proceedings, and lower courts have recognized that this is by no means the same test as those which determine criminal responsibility at the time of the crime.² The question, then, is not whether the facts before the trial judge suggested that Robinson's crime was an insane act but whether they suggested he was incompetent to stand trial.

The Court's affirmative answer seemingly rests on two kinds of evidence, principally adduced by Robinson to prove an insanity defense after the State rested its main case. First, there was evidence of a number of episodes of severe irrationality in Robinson's past. Among them were the slaying of his infant son, his attempted suicide, his efforts to burn his wife's clothing, his fits of temper and of abstraction, and his seven week incarceration in a state hospital eight years before the trial. This evidence may be tempered by the State's counterarguments,

² See *James v. Boles*, 339 F. 2d 431; *United States v. Kendrick*, 331 F. 2d 110; *Lyles v. United States*, 254 F. 2d 725.

for example, that Robinson was found guilty of his son's killing and that alcoholism may explain his hospitalization, but it cannot be written off entirely. The difficulty remains that while this testimony may suggest that Flossie May Ward's killing was just one more irrational act, I cannot say as a matter of common knowledge that it evidences incapacity during the trial. Indeed, the pattern revealed may best indicate that Robinson did function adequately during most of his life interrupted by periods of severe derangement that would have been quite apparent had they occurred at trial. The second class of data pertinent to the Court's theory, remarks by witnesses and counsel that Robinson was "presently insane," deserves little comment. I think it apparent that these statements were addressed to Robinson's responsibility for the killing, that is, his ability to do insane acts, and not to his general competency to stand trial.³

Whatever mild doubts this evidence may stir are surely allayed by positive indications of Robinson's competence at the trial. Foremost is his own behavior in the courtroom. The record reveals colloquies between Robinson and the trial judge which undoubtedly permitted a reasonable inference that Robinson was quite cognizant of the proceedings and able to assist counsel in his defense.⁴ Turning from lay impressions to those of an

³ At the time Robinson's mother and Mrs. Calhoun made the statements noted in the Court's opinion, p. 8, n. 5, *ante*, they also stated Robinson did not know the difference between right and wrong. Counsel's statement too, quoted by the Court at p. 11, n. 8, *ante*, was directed to acquittal, not postponement. See, n. 5, *infra*, Mrs. Moore, a family friend, responded to the question on Robinson's sanity by saying: "When he is in those moods, I think he is insane; when he is in those moods, because he is terrible."

⁴ The Illinois Supreme Court stated in its opinion: "[T]he record reflects several instances where defendant displayed his ability to assist in the conduct of his defense in a reasonable and rational manner. Typical instances of when defendant displayed mental

expert, it was stipulated at trial that a Dr. Haines, Director of the Behavior Clinic of the Criminal Court of Cook County, had examined Robinson several months earlier and, if called, would testify that Robinson "knows the nature of the charge and is able to cooperate with his counsel." The conclusive factor is that Robinson's own lawyers, the two men who apparently had the closest contact with the defendant during the proceedings, never suggested he was incompetent to stand trial and never moved to have him examined on incompetency grounds during trial;⁵ indeed, counsel's remarks to the jury

alertness, as well as understanding and knowledge of the proceeding, appear in the remarks to the court as follows: 'Your honor, they were on the State's witness list and the State said they have several witnesses. They produced two. For what reason, I don't know, but I am on trial here and I would like to be given every consideration, and I would like that the court be adjourned until tomorrow morning—to give me time to confer with counsel for the calling of witnesses.' Again, when discussing witnesses with the court, defendant said: 'Well, the police are contending that the clothes they have found in Moore's apartment was mine. That is the reason at the beginning of trial, I asked the attorney to have a pre-trial preliminary to determine the admissibility and validity of the evidence that the State was intending to use against me.' 22 Ill. 2d, at 168, 174 N. E. 2d, at 823.

⁵ The record in my view does not bear out any suggestion that Robinson's counsel apprised the trial judge that he believed Robinson incompetent to stand trial, even granting that "insane" was a synonym for "incompetent" under then-existing state law (p. 9, n. 6, *ante*). Under Illinois law, as one would naturally expect, incompetence at the time of trial has been grounds not for acquitting the defendant but for postponing his trial: and nowhere in the record does Robinson's counsel even hint to the judge that he believes the trial should be deferred or abated because his client is not fit to continue. The ready explanation for counsel's references to "present insanity," apart from emphasizing Robinson's general lack of criminal responsibility, is that Illinois law provided that one acquitted on grounds of insanity at the time of the crime shall by the same verdict be found cured of or still afflicted with "such insanity" and committed in the latter instance. Ill. Rev. Stat., c. 38, § 592 (1959).

seem best read as an affirmation of Robinson's present "lucidity" which would be highly peculiar if Robinson had been unable to assist properly in his defense. See p. 11, n. 8, *ante*, of the Court's opinion.

Thus, I cannot agree with the Court that the requirements of due process were violated by the failure of the trial judge, who had opportunities for personal observation of the defendant that we do not possess, to halt the trial and hold a competency hearing on his own motion.

Several other grounds have been urged as a basis for habeas corpus relief for Robinson. These other grounds are understandably not discussed in the Court's opinion, and I think it is sufficient for me to say I do not believe that they warrant further proceedings. In my view, the Court of Appeals should be reversed and the District Court's dismissal of the petition reinstated.